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**HARVARD LAW SCHOOL
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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT
OF THE

STATE OF INDIANA,

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-BOOKS
CITED, STATUTES CITED AND CONSTRUED, AN INDEX
AND NOTES TO THE REPORTED CASES**

PHILIP ZOERCHER,
OFFICIAL REPORTER

NORMAN E. PATRICK, Assistant Reporter

VOL. 53

**CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1912,
NOT REPORTED IN VOLUME 52, AND CASES DECIDED
AT THE MAY TERM, 1913.**

INDIANAPOLIS:
WM. B. BUNFORD, PRINTER TO THE STATE
1914

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JUDGES

OF THE

APPELLATE COURT

OF THE

STATE OF INDIANA,

WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.

HON. ANDREW A. ADAMS.*¶
HON. MILTON B. HOTTEL.‡¶
HON. JOSEPH G. IBACH.**¶
HON. JOSEPH H. SHEA.§
HON. EDWARD W. FELT.¶
HON. MOSES B. LAIRY.¶

•Chief Justice at May Term, 1913.

••Chief Justice at November Term, 1912.

‡Presiding Judge at November Term, 1912, and May Term, 1913.

¶Elected in 1910.

‡Elected in 1912.

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CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

**AT INDIANAPOLIS, NOVEMBER TERM, 1912, AND MAY
TERM, 1913, IN THE NINETY-SEVENTH
YEAR OF THE STATE.**

**EIGENMANN v. BOARD OF COMMISSIONERS OF THE
COUNTY OF VANDERBURGH ET AL.**

[No. 7,813. Filed March 7, 1913.]

1. **COUNTIES.—Bridges.—Contracts.—Bids.—Discretion of Board of Commissioners.**—Under the provisions of §5898 Burns 1908, Acts 1907 p. 580, that contracts shall be let to the lowest responsible bidder, and that the board of commissioners shall have power to reject any and all bids, or under §7689 Burns 1908, Acts 1905 p. 521, providing that the board may let the contract to the lowest and best bidder, and that it may reject any and all bids, the board of county commissioners is vested with some discretion in passing on bids submitted for the construction of a bridge.
p. 3.
2. **COUNTIES.—Bridges.—Contracts.—Bids.—Discretion of Board of Commissioners.—Evidence.**—In a taxpayer's action to enjoin the carrying out of certain contracts for the construction of bridges, the decision of the trial court, that the rejection of a certain bid by the board of commissioners was not arbitrary and was not an abuse of the discretion vested in such board, was warranted by evidence showing that the experience of the board with the successful bidders with reference to the performance of other contracts, had been entirely satisfactory, that the accepted bid on one bridge was \$28 higher than the rejected bid, and \$30 higher as to the other bridge, that the past personal experience of the board with the representative of the lower bidder in the construction of bridges had been unsatisfactory, that such representative was a director and vice-president of the company that

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submitted the low bid, and that in awarding the contracts the board considered such facts and also the character of the work to be performed and the ability of the bidders to perform same. p. 4.

3. COUNTIES.—*Contracts.—Bids.—Affidavit of Bidder.—Signatures.—Conclusiveness of Notary's Jurat.*—A bidder's noncollusion affidavit, containing the matters prescribed by statute (§5897 Burns 1908, Acts 1907 p. 580) and signed "Grammer & Smith" and bearing the jurat of a notary showing that it was subscribed and sworn to, is sufficient in the absence of evidence that it was not individually signed by the two men, since the use of one's Christian name is not material to the validity and binding effect of his signature. p. 5.

From Superior Court of Vanderburgh County; *John H. Foster*, Judge *Pro Tem*.

Action by Henry W. Eigenmann against the Board of Commissioners of the County of Vanderburgh and others. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

Robinson & Stilwell, for appellant.

Daniel H. Ortmeyer and *Spencer, Brill & Hatfield*, for appellees.

IBACH, C. J.—This action was brought by appellant Eigenmann as a taxpayer of Vanderburgh County, Indiana, to enjoin appellees from carrying out certain contracts entered into between appellees Ruston, Hornby and Koch, as the board of county commissioners of Vanderburgh County, and appellee Whitehead, and appellees Grammer & Smith, as contractors for the erection of certain bridges. It appears that in June, 1910, pursuant to advertisement, the board of commissioners opened three bids for each of two bridges, known as the Ehrhardt bridge and the Wartman bridge. Grammer & Smith bid \$895 on the Ehrhardt bridge and \$1,100 on the Wartman bridge, Whitehead bid \$875 on the Ehrhardt bridge, and \$1,122 on the Wartman bridge. The A., E. & W. Construction Company bid \$847 on the Ehrhardt bridge, and \$1,070 on the Wartman bridge.

The board awarded the contract for the Ehrhardt bridge to Whitehead, and that for the Wartman bridge to Grammer & Smith.

The theory of the complaint is that the board arbitrarily refused to consider the bid of the A., E. & W. Construction Company, although it was the lowest responsible bidder on each bridge, and had complied with all the requirements of the statute respecting the submission of bids, and that the firm of Grammer & Smith, to whom the board let the contract for the Wartman bridge and was about entering into a contract therefor, had failed to comply with the statute requiring each bidder to accompany his bid with an affidavit of noncollusion with other bidders, that the board was without power or authority to let the contracts as it was preparing to do, and plaintiff asks that it be enjoined from so doing.

Appellant contends that the letting of contracts for bridges is governed by §5896 Burns 1908, Acts 1907 p. 580, which provides that the board shall “let the same to

1. the lowest responsible bidder upon the terms of the notice mentioned and on the plans and specifications so deposited, as in this act provided: *Provided*, the said board of commissioners shall have the power to reject any and all bids, and may again advertise for bids.” Appellees are disposed to consider that the matter is governed by §7689 Burns 1908, Acts 1905 p. 521, which provides that the board may “let the contract to the lowest and best bidder, if his bid be reasonable, and may enter into written contract with him. But the board may reject all bids and readvertise for other bids.” However, in our opinion, under either statute the result would be the same, and we may, for the purposes only of deciding this appeal, grant appellant’s contention that §5896, *supra*, controls. Under statutes providing that contracts shall be let to the lowest responsible bidder, the board is given some discretion, as well as under statutes which provide that contracts may be let to the lowest and best bidder. *Boseker v. Board, etc.* (1882), 88 Ind. 267;

Ness v. Board, etc. (1912), 178 Ind. 221, 98 N. E. 1002. The statute under consideration further gives the board power to reject any and all bids.

The evidence perhaps shows that the A., E. & W. Construction Company had filed a sufficient bond, and that it had built satisfactorily some bridges in counties adjoining

2. Vanderburgh. But it appears from appellees' evidence that appellant, Eigenmann, vice-president of said company, which was an organization then but a few months old, had shortly before the time of letting the contracts in question built a bridge for the same board of commissioners of Vanderburgh County against which this suit is brought. Some difficulty arose between the board and Eigenmann about this bridge. The board required him to change the walls of the bridge after they had been partially erected, there was much delay in the completion of the work, the board made five or six trips of inspection before the work was finally completed and accepted, they were troubled with complaints that Eigenmann obstructed the highway with his materials, and at one time the board was so much dissatisfied with the work that it considered bringing a suit on his bond as a contractor. Appellant's evidence contradicts much of the above, and there is a strong conflict in the evidence.

Eigenmann was a stockholder in and a director and vice-president of the A., E. & W. Construction Company, and appeared as its representative in seeking the contract. It probably was not amiss for the board to conclude that the work which the company would do would be similar to that which its representative had done. All of the members of the board testified that all the bids were considered, that none was arbitrarily rejected, and that the bid of the A., E. & W. Construction Company received the same consideration as the others. One member testified, in addition, that the board in considering the bids of this company took into account the kind of bridge to be built, the knowledge the company's men had in building a bridge, what its men had done before for

the board, the differences in the amounts bid, which were \$28 on one bridge and \$30 on the other, and made the awards as it thought best for the county, with no other object in view. That it did not consider the A., E. & W. Construction Company the best bidder, nor its bid equal to the other bids, and that it had never had any trouble with the other bidders, "they go out and know just what to do and go and do it." In view of the discretion allowed the commissioners by the statute and the decisions construing it, and on reviewing the evidence submitted, we cannot say that the court erred in deciding that the board had not arbitrarily rejected the bid of the A., E. & W. Construction Company, and had not abused its discretion.

The affidavit of Grammer & Smith was a verified
3. statement made on the form furnished by the state board of accounts, containing the matters prescribed by §5897, *supra*, and concluding as follows:

"Affiant declares that he has carefully read the provisions of the above and foregoing statement and understands them.

(Signed) Grammer and Smith.
(Address) Evansville, Indiana.

Subscribed and sworn to before me, this 30th day of June, 1910.

Margaret Sihler,
Notary Public.

Commission Expires, September 15, 1911."

Appellant claims that this affidavit was not signed by any one, that a signature in the firm name is not a sufficient signature, and that the statute required that Grammer and Smith should each sign and be sworn to the affidavit. We believe that it appears from the record that the affidavit was signed by Grammer and by Smith. The notary's jurat is a certification that the affidavit was signed and sworn to by the persons who purported to sign it and no evidence was introduced to contradict the jurat. This court cannot say that both Grammer and Smith did not sign the affidavit. It is

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immaterial that their Christian names are not given. Grammer could have signed the affidavit and the bid and the contract, and in fact, any contract, by the one name, "Grammer." Smith could likewise have signed by the name "Smith." Such signatures would have been valid and binding in law. The notary has certified that they did sign and were sworn. If such was not the case, appellant should have proved it by evidence. See *Randall v. Baker* (1850), 20 N. H. 335. In the case of *Gaddis v. Durashy* (1833), 13 N. J. L. 324, cited by appellant, the parties admitted that only one of them signed and swore to the affidavit, thus contradicting the notary's certificate. The reasoning of the opinion in that case supports our holding. We do not approve the holding in the case of *Norman v. Horn* (1889), 36 Mo. App. 419, cited by appellant. So far as it appears in evidence here, the affidavit of Grammer & Smith was signed in conformity with the statutory requirements.

No error appearing, the judgment is affirmed.

NOTE.—Reported in 101 N. E. 38. See, also, under (1, 2) 11 Cyc. 482; (3) 11 Cyc. Anno. 481-New. As to liability of county boards for acts involving discretion, see 95 Am. St. 83. As to discretion in choosing between bidders for public contract, see 38 L. R. A. (N. S.) 653. As to the construction of "lowest responsible bidder" or a similar phrase in a statute providing for the letting of municipal contracts, see Ann. Cas. 1913 A. 500.

THE MOUNT CARMEL AND JOHNSON'S FORK TURNPIKE COMPANY v. LOOS.

[No. 7,849. Filed March 11, 1913.]

1. PLEADING.—*Issues.*—*Variance.*—Where a defendant pleads and relies solely on an affirmative defense, he must, as a rule, recover according to the allegations of such answer, or not at all. p. 9.
2. JUSTICES OF THE PEACE.—*Appeals.*—*Pleading.*—The rules of pleading in actions before justices of the peace remain the same where appeals are taken to the circuit court. p. 9.
3. TURNPIKES AND TOLL ROADS.—*Action for Penalties.*—*Action Commenced Before Justice of the Peace.*—*Special Defense.*—*Pleading.*

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—In an action commenced before a justice of the peace to collect a penalty for failure to pay toll, the defendant, under §1749 Burns 1908, §1460 R. S. 1881, providing that all matters of defense, except the statute of limitations, set-off, and matter in abatement, may be given in evidence without plea, may show that plaintiff's road was out of repair for an unreasonable time without pleading such fact, since §4574 Burns 1908, §3684 R. S. 1881, making it lawful, in a suit for the collection of a penalty for failure to pay toll, to plead the want of repair in bar of the suit, was not intended to change the procedure in actions commenced before justices of the peace. p. 9.

4. TURNPIKES AND TOLL ROADS.—*Action for Penalties.—Non-Payment of Toll.—Defenses.—Failure to Repair Road.*—Under §4525 Burns 1908, §3635 R. S. 1881, providing that if a company shall suffer its road to be out of repair to the hindrance or delay of travelers for an unreasonable length of time, it shall have no right to collect tolls thereon until the same is repaired, and §4574 Burns 1908, §3684 R. S. 1881, providing that when a toll road is permitted to be out of repair for a longer time than would be required to make the necessary repairs, the owner shall not be entitled to collect tolls on that portion that is out of repair while it remains in such condition, a finding for defendant was authorized in an action for the collection of a penalty for failing to pay toll, where it was shown that of plaintiff's road, which was two miles long, one-fourth was out of repair for an unreasonable length of time before defendant refused to pay, and there was evidence that the remainder was not in good condition. p. 10.

From Dearborn Circuit Court; *George E. Downey*, Judge.

Action by The Mount Carmel and Johnson's Fork Turnpike Company against George Loos. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Morris W. McManaman and *Warren N. Hauck*, for appellant.

Estal G. Bielby, for appellee.

ADAMS, J.—This action was commenced by appellant before a justice of the peace to recover from appellee the penalty provided by §4534 Burns 1908, §3644 R. S. 1881, for failure to pay toll in travelling over appellant's turnpike. The trial before the justice resulted in a judgment in favor of appellee. An appeal was taken to the Dearborn Circuit

Court, where appellee filed an answer in two paragraphs, the first in general denial and the second a special answer, alleging, in substance, that appellant is a corporation organized and existing under the laws of the State of Indiana for the purpose of maintaining and operating a gravel road or turnpike in Harrison Township, Dearborn County, Indiana; that appellant on the dates at which the tolls sued for accrued did operate a gravel road or turnpike on the route described in appellant's complaint; that said gravel road is situate along, on and over an existing highway; that at and prior to the accruing of the tolls sued for said gravel road or turnpike had become and remained out of repair for an unreasonable length of time.

To this special paragraph of answer appellant filed a reply in denial. On issues thus joined the cause was submitted to the court, resulting in a finding and judgment for appellee, from which judgment this appeal is taken. The only error assigned is that the court erred in overruling appellant's motion for a new trial.

It is urged by appellant that as the answer did not allege any facts tending to show that appellant's road had been out of repair longer than was necessary to make repairs, with a reasonable force, taking into consideration the season of the year and other equitable circumstances, the answer therefore afforded no basis for the introduction of proof, and formed no issue under which the court was authorized to find that appellee was excused from paying toll by reason of such lack of repair. Appellant also insists that when a party relies only upon an affirmative defense, he must recover according to the allegations of his affirmative answer, or not at all.

Section 4574 Burns 1908, §3684 R. S. 1881, provides that "hereafter whenever any gravel, turnpike, macadamized or plank road shall be suffered to get and remain out of repair for a longer period of time than would be required to make the necessary repairs with a reasonable force, the season of

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the year and other equitable circumstances considered, the corporation or company, owner or owners of such road, shall not be entitled to receive and collect toll upon such road, or upon so much of the same as is out of repair, while the same shall remain out of repair; and it shall be lawful, in any suit for the collection of toll, or any penalty for failure to pay such toll, for the defendant to plead such want of repair in bar of said suit.”

It is generally true, as insisted by appellant, that where a defendant pleads and relies solely on an affirmative

1. defense, he must recover according to the allegations of his affirmative answer, or not at all. But this rule could not in any event apply to the case before us.

It will be noted that the action was originally commenced before a justice of the peace. By §1749 Burns

1908, §1460 R. S. 1881, it is provided that “all mat-

2. ter of defense, except the statute of limitations, set-off and matter in abatement, may be given in evidence without plea.” And it is well settled that the rules of pleading in actions before justices of the peace remain the same where appeals are taken to the circuit court.

In *Campbell v. Nixon* (1891), 2 Ind. App. 463, 465, 28 N. E. 107, the court said: “The rules of pleading before justices of the peace are applicable in the circuit court on appeals from justices, and all defenses except the statute of limitations, set-off, matter in abatement and the denial of the execution, or the assignment of a written instrument, may be given in evidence without plea.” See, also, *Metropolitan Life Ins. Co. v. Bowser* (1898), 20 Ind. App. 557, 564, 50 N. E. 86.

Appellant admits that §1749, *supra*, and the cases decided under it, would be controlling in actions generally, but insists that this action was a special proceeding in

3. which a special defense was created by statute, and that the general rules of civil procedure can only apply where the statute is silent as to special defenses; that

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where the statute provides that a defendant “may plead such want of repair in bar of said suit” (§4574, *supra*,) there is no room for the contention that a statute enacted long before this defense came into existence (§1749, *supra*,) was included in its provisions. There is no merit in this contention, and the question is no longer an open one in this State. In the case of *Aurora, etc., Turnpike Co. v. Neibruggee* (1900), 25 Ind. App. 567, 58 N. E. 864, a case very similar to the one at bar, at page 569, this court said: “This action having been commenced before a justice of the peace, the facts alleged in the paragraph of answer if material could have been proved without any plea.” We must hold that the provision in §4574, *supra*, was not intended to change the procedure in actions appealed from justices of the peace.

It is also urged by appellant that if evidence as to the condition of the road was admissible under the special answer, such evidence shows that only a part of the

4. road was out of repair, and that even if appellee was justified in refusing to pay toll on that part, the statute affords no defense for refusing to pay on the remainder, not out of repair. Appellant’s turnpike was two miles in length, and it was clearly shown that parts of the road were in bad condition, and had been in such condition for a longer time than would reasonably have been required to repair the same. It was also shown that at least one-fourth of the entire road was out of repair, and there was some evidence that the remainder was not in good condition.

It is provided by §4525 Burns 1908, §3635 R. S. 1881, that “if such company shall suffer the road to be out of repair to the hindrance or delay of travellers for any unreasonable length of time, it shall have no right to collect tolls thereon until the same is repaired.” Construing this section with §4574, *supra*, we do not think that a gravel road or turnpike two miles long, one-fourth of which was shown to be out of repair for an unreasonable length of time before

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appellee refused to pay tolls, was such a road as to authorize the collection of tolls from travelers using the same. It was clearly not the purpose of the statute to allow a turnpike company to make a charge for such part of its road as it deemed to be in good condition, and permit the balance to remain out of repair. We think the trial court reached a correct conclusion on the facts presented by the evidence in this case.

The judgment is affirmed.

NOTE.—Reported in 101 N. E. 116. See, also, under (1) 31 Cyc. 700; (2) 24 Cyc. 736; (3) 24 Cyc. 568; (4) 38 Cyc. 392, 404.

TOWNSEND ET AL. v. MILLICAN.

[No. 7,801. Filed March 12, 1913.]

1. **APPEAL.—Questions Presented for Review.—Sufficiency of Complaint.—Exceptions to Conclusions of Law.**—Where the facts specially found by the trial court are substantially the same as those stated in the complaint, an exception to the conclusion of law will present the same question as that raised by a demurrer challenging the sufficiency of the complaint. p. 13.
2. **DEEDS.—Delivery.—Intent of Grantor.**—To constitute a delivery of a deed so as to pass title it is necessary that the grantor should intend to give effect to the instrument. p. 15.
3. **DEEDS.—Delivery.—Intent of Grantor.—Question of Fact.**—The intention of a grantor, with reference to the delivery of a deed so as to pass title, may be manifested by words, acts, or conduct, and is generally a question of fact for the court or jury trying the issues of fact. p. 15.
4. **DEEDS.—Delivery.—Prima Facie Delivery.—Evidence.**—While evidence that a deed was placed on record by a grantor after it had been duly signed, acknowledged and transferred for taxation, shows a *prima facie* case of delivery, such *prima facie* case may be rebutted by evidence of words, acts, or conduct, tending to show that it was not the intention of the grantor to give effect to the instrument. p. 15.
5. **DEEDS.—Delivery.—Evidence.—Findings.—Conclusions of Law.**—The finding of the trial court that plaintiff did not intend to pass title by a deed which he signed and caused to be recorded, is not overcome by evidentiary facts set out in the finding that may be reconciled with the ultimate fact so found, so that its con-

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clusion of law that plaintiff's title should be quieted was not erroneous. p. 16.

6. APPEAL.—*Review.—Ruling on Motion for New Trial.*—Where there was evidence tending to support every material fact found by the court, a motion for a new trial based on the insufficiency of the evidence to support the findings was properly overruled. p. 16.

From Hamilton Circuit Court; *Dan Waugh*, Special Judge.

Action by Madison W. Millican against Amanda L. Townsend and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

J. A. Roberts and Shirts & Fertig, for appellants.

Hanly, McAdams & Artman and Christian & Christian, for appellee.

LAIRY, J.—This was an action brought by appellee to quiet title to certain real estate. The complaint was in two paragraphs, to each of which a demurrer for want of facts was filed and overruled. There was a general denial and an answer pleading the statute of limitations. A reply in denial closed the issues, and they were tried by the court without the intervention of a jury. The court made a special finding of facts and stated conclusions of law thereon. Appellants' motion for a new trial was overruled, and judgment rendered in favor of appellee.

The errors assigned and relied on for reversal are the actions of the trial court in overruling appellants' demurrers to the first and second paragraphs of complaint, in overruling appellants' motion for a new trial, and in stating its first conclusion of law.

As it is conceded by both parties to this appeal that the judgment rests on the first paragraph of complaint, we need not consider the question presented by the demurrer to the second paragraph.

The facts specially found by the court are substantially the same as those stated in the first paragraph of the complaint.

By its first conclusion of law the court found that
1. appellee was the owner of the real estate described,
and that he was entitled to a judgment quieting his
title thereto. The exception of appellant to this conclusion
of law raises the same question presented by the demurrer
to the complaint.

The facts as disclosed by the special finding, so far as they
are necessary to this opinion, are, in substance, as follows:
In the year 1878 plaintiff became the owner of the land in
question, went into possession thereof, and resided thereon
until February, 1886, on which date he married and moved
to other lands in Hamilton County. Prior to the marriage
of plaintiff, his father and mother and their children, in-
cluding plaintiff, resided on the land as a family, and after
plaintiff moved away he rented the real estate from year to
year, up to and including the time of the trial, to his brother,
Thomas Millican, one of the defendants, to farm the same,
retaining a share of the proceeds for himself and delivering
a share to their father for support. About February 9,
1886, the plaintiff, then contemplating marriage, and not in
good health, and for the purpose of providing a home for
his father and mother, that they might remain on the land
in question during their lifetime, signed and acknowledged
a warranty deed, purporting to convey the land to his sister,
Amanda L. Townsend, one of the defendants. Plaintiff had
this deed recorded the same year, but at all times retained
it in his possession and control, except at the time it was in
the hands of the recorder, and did not at any time deliver
the deed to his sister, the grantee named therein, or either
of her codefendants, or to any one, and the execution and
recording of the deed by plaintiff was without any intention
or purpose on his part of transferring the ownership of the
farm or any part of it. Prior to the execution of the deed,
it was agreed between plaintiff and his sister, Amanda L.
Townsend, that the deed should not pass the title to the real
estate to her, and that the deed should not be delivered, but

should be held and retained by plaintiff under his exclusive control. Plaintiff at all times retained possession of the real estate as owner thereof, either in person or by his tenant, and at all times paid the taxes that accrued, except a few times when such taxes were paid by his father. Plaintiff paid the taxes for the last five years immediately preceding the trial, and in 1887, and at several times subsequent erected buildings on the property and made other valuable improvements at his own expense. He also paid an existing mortgage indebtedness on the land amounting to nearly \$2,000, and all of the improvements were made, taxes paid and money expended by plaintiff under the belief that he was the owner of the property in question, and with the knowledge of defendants and without objection from them. In February, 1890, there was due on the mortgage indebtedness a balance of \$200, and in order to obtain money to pay and release such mortgage plaintiff borrowed the amount from Daniel Jones, the husband of one of the defendants, and caused defendant Amanda L. Townsend to execute her note to Jones in the sum of \$200, and to secure the same executed a mortgage on the real estate to Jones. The plaintiff paid the interest on this debt and part of the principal. In 1897 defendant Amanda L. Townsend executed a deed of conveyance of the farm to Hubert D. Vestal, which deed was duly recorded, and Hubert D. Vestal the same day executed a deed conveying the same land to the defendants in this suit. These conveyances were made without any consideration and for the purpose only of transferring title to defendants, and the deeds were executed without the knowledge of plaintiff. After the execution of the deeds last mentioned, defendants paid the balance of the mortgage indebtedness, which amounted to about \$175.

The court further found that defendants were claiming an interest in and to the real estate, which interest was adverse to plaintiff's rights, was without right and unfounded, and a cloud on plaintiff's title, and that plaintiff was entitled

to have his title to said real estate quieted as against the claim of defendant.

Under the facts stated in the complaint and set out in the special findings, we are required to determine whether the legal title to the land in question was in Madison Millican at the time this action was commenced.

If it was, the judgment of the trial court should be affirmed; if not, it should be reversed. This is the pivotal question in the case.

The legal title to this real estate was in Madison Millican, unless it passed from him to his sister by the deed which he signed and acknowledged on February 9, 1886. This deed was afterwards transferred for taxation and recorded, and by its terms it purported to convey the legal title. If the conduct of appellee in having the deed transferred for taxation and recorded, when considered in connection with the other facts alleged and specially found, amounted to a delivery of the deed, the title passed, but if there was no delivery of the deed, the title did not pass.

To constitute a delivery of a deed so as to pass title,

2. it is absolutely necessary that the grantor should intend to give effect to the instrument. This intention may be manifested by words, acts, or conduct,
3. and is, generally, a question of fact for the court or jury trying the issues of fact. *Dearmond v. Dearmond* (1858), 10 Ind. 191; *Fifer v. Rachels* (1906), 37 Ind. App. 275, 76 N. E. 186; *Pethtel v. Pethtel* (1910), 45 Ind. App. 664, 90 N. E. 102.

Evidence that a deed was placed on record by a grantor after it had been duly signed, acknowledged and transferred for the purpose of taxation has been held sufficient to

4. show a *prima facie* case of delivery; but the *prima facie* case so shown may be rebutted by evidence of words, acts or conduct tending to show that it was not the intention of the grantor to give effect to the instrument. *Somers v. Pumphrey* (1865), 24 Ind. 231; *Colee v. Colee*

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(1890), 122 Ind. 109, 23 N. E. 687, 17 Am. St. 345; *Firemans Fund Ins. Co. v. Dunn* (1899), 22 Ind. App. 332, 53 N. E. 251; *Vaughan v. Godman* (1884), 94 Ind. 191.

The finding of the court that appellee did not intend to pass title by the deed which he signed and caused to be recorded is not overcome by other facts stated in the

5. findings. The other facts on this question, as set out in the findings, are merely evidentiary facts tending to sustain or overthrow the ultimate fact that there was no delivery. The court found that the deed in question was not delivered, and the evidentiary facts set out in the special finding may be all reconciled with the ultimate fact so found. We conclude, therefore, that the court did not err in its first conclusion of law.

In discussing the question presented by counsel to sustain his contention that the facts specially found are not sufficient to sustain the first conclusion of law stated by the court, we have disposed of the principal objections urged against the complaint. The court has considered the other objections pointed out, but is of the opinion that they cannot be sustained. The complaint is sufficient.

There is some evidence tending to support every
6. material fact found by the court, and the motion for a new trial was properly overruled.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 112. See, also, under (2) 13 Cyc. 561; (3) 13 Cyc. 561, 565; (4) 13 Cyc. 730; (5) 38 Cyc. 1986; (6) 29 Cyc. 837. As to what is delivery of a deed, see 53 Am. St. 537. For a discussion of the delivery of a deed for a deposit by the grantor for registration, see 7 Ann. Cas. 226.

KIRK ET AL. v. MACY.

[No. 7,862. Filed March 12, 1913.]

1. **APPEAL.—Briefs.—Sufficiency.**—A brief, though subject to criticism, is sufficient, if it shows a good faith effort to comply with the rules of court and is in substantial conformity with the same as to the questions presented for determination. p. 19.
2. **EXEMPTIONS.—Execution Sales.—Statutes.—Construction.**—Although §756 Burns 1908, §714 R. S. 1881, providing that, to be entitled to the benefit of exemption from execution sale, the judgment debtor should make out and deliver to the officer holding the writ a sworn inventory of all his property, the law that exempts from sale on execution is to be liberally construed and its application is not limited to cases which fall directly within its strict letter, but is extended to all cases that come within the spirit and equity of the law, so as to promote and secure the object intended. p. 20.
3. **EXEMPTIONS.—Execution Sale.—Transfer of Property Exempt.**—Where a judgment is founded on contract, the judgment debtor, if a resident householder, and his entire estate does not exceed in value the amount which he is authorized to claim as exempt from sale on such judgment, may, before such sale occurs, sell or dispose of any or all of his property and the purchaser will take it free from the lien of the judgment, or the lien of any execution that may have been issued thereon. p. 21.
4. **EXEMPTIONS.—Execution Sale.—Transfer of Exempt Real Estate.—Rights of Purchaser.—Quieting Title.**—Where a judgment debtor on a judgment founded on contract, who is a resident householder and whose entire estate does not exceed in value the amount which he is authorized to claim as exempt from sale on such judgment, disposes of any of his real estate before such sale occurs, the purchaser may maintain an action to quiet his title against the lien of the judgment, if he commences his suit before such real estate is sold under the judgment. p. 21.
5. **EXEMPTIONS.—Rights of Purchaser of Exempt Real Estate.—Quieting Title.—Equitable Principles.**—The right of the purchaser of real estate, which the vendor could have claimed as exempt from sale on execution, to maintain an action commenced before the execution sale to quiet his title thereto as against the judgment lien rests on equitable principles. p. 22.
6. **EXEMPTIONS.—Quieting Title to Property Purchased Before Execution Sale.—Complaint.—Sufficiency.—Allegations as to Schedule.**—In an action brought before execution sale to quiet title to

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real estate purchased from a judgment debtor, and which such debtor could have claimed as exempt from sale on execution, a complaint alleging that such judgment "is not and at no time has been a lien upon said real estate, or upon any interest therein," was sufficient without alleging that plaintiff had filed a schedule showing the value of the debtor's property, since the filing of such schedule is not essential to maintaining the action. p. 22.

7. **APPEAL.—Review.—Objection to Complaint.—Ruling on Demurrer.**—Alleged error in overruling a demurrer to a complaint, is not available where the objection on which it was based could have been cured in the trial court by a motion to make the complaint more specific. p. 22.
8. **EXEMPTIONS.—Quieting Title to Property Purchased Before Execution Sale.—Complaint.—Evidence.—Admissibility.**—In an action brought before execution sale to quiet title to real estate purchased from the judgment debtor, evidence of the value of the debtor's property was admissible under the allegations of the complaint that the judgment was not and had at no time been a lien on such real estate. p. 22.
9. **APPEAL.—Review.—Evidence.—Findings.**—If there is any evidence to sustain the finding of the trial court, the judgment will not be reversed on the evidence. p. 23.
10. **EXEMPTIONS.—Quieting Title to Property Purchased Before Execution Sale.—Evidence.—Sufficiency.**—In an action brought before execution sale to quiet title to real estate purchased from the judgment debtor, evidence showing that the debtor's interest in real property was worth less than \$600 and that he had no unincumbered personal property, but not showing that he did not have incumbered personal property of sufficient value to defeat his claim to exemption, is insufficient to sustain a finding and judgment for plaintiff. p. 23.

From Henry Circuit Court; *Ed Jackson*, Judge.

Action by Emma P. Macy against Kersey H. Kirk, Sheriff of Henry County, and another. From a judgment for plaintiff, the defendants appeal. *Reversed*.

Samuel H. Brown and *Clarence H. Beard*, for appellants.
Robert S. Hunter, for appellee.

SHEA, J.—This action was brought by appellee to enjoin appellants from selling certain real estate, described in the complaint, to satisfy a judgment against same, and to quiet her title thereto.

The complaint was in one paragraph, to which appellants' separate demurrers were overruled. Answer in general denial. Trial by court, finding and judgment for appellee, quieting her title to said real estate. The errors assigned are the overruling of appellants' demurrers, and the overruling of their separate motions for a new trial.

The complaint alleges that appellee is the owner in fee simple of certain described real estate in Henry County; that in August, 1907, appellant, Central Trust and Savings Company, of Newcastle, Indiana, obtained a judgment in the Henry Circuit Court for \$436 against Joshua I. Dickinson and John A. Catt; that an execution issued on said judgment, at its instance, which was placed in the hands of appellant Kersey H. Kirk, the duly qualified and acting sheriff of Henry County; that under said writ, appellant, on May 7, 1910, levied on the real estate described, as the property of appellee, and advertised the same for sale on said execution; that said judgment has at no time been a lien on said real estate or any part thereof, or any interest in same; that the sale of the property under execution would create a cloud on appellee's title, which she will be remediless at law to remove. Appellee prays that a temporary injunction be issued to restrain said execution sale, and enjoining and restraining appellants from enforcing the judgment against said real estate; that on final hearing the injunction be made perpetual, and that her title to said lands be quieted and forever set at rest as against the claims of said Central Trust and Savings Company.

It is urged by appellee that appellants' brief does not comply with Rule 22 of this court, in that it fails to set out under the proper headings what the issues were, how

1. decided, etc. While appellants' brief may be subject to criticism, it shows a good-faith effort to comply with the rules of this court, and is in substantial conformity with the same as to the questions presented for determination, which is sufficient. *Howard v. Adkins* (1906), 167 Ind.

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184, 78 N. E. 665; *Indiana Union Traction Co. v. Heller* (1909), 44 Ind. App. 385, 89 N. E. 419.

Appellants argue that the court erred in overruling their demurrers, because, as shown by the record, appellant Central Trust and Savings Company obtained the judgment against Joshua Dickinson and John A. Catt on August 28, 1907, at which time said Catt was the owner in fee simple of the real estate in controversy, therefore the judgment was a *bona fide* lien against the same; that because appellee did not make out and file a schedule of all the property said Catt owned at the time the judgment was rendered, or when the real estate was transferred to her, showing it to be worth less than \$600, she was not entitled to have the property set off to her, and that the complaint is bad because it does not allege this was done, citing §756 Burns 1908, §714 R. S. 1881.

This section of the statute reads as follows: "Before

2. any person shall be entitled to the benefit of the provisions of the above recited act, he shall make out and deliver to the sheriff or other officer having the writ, an inventory of all of his or her real estate, within or without this state, money on hand or on deposit within or without this state, rights, credits, and choses in action, and all personal property of every description whatever belonging to him or in which he had any interest at the date of the issuing of the writ, and make and subscribe an affidavit to the same that such inventory contains a full and true account of all such property as required in this act to be set out in the said inventory, had or held by him at the time such writ was issued; and if any such property has been disposed of by him since the issuing of the writ, such affidavit shall show that fact and how the same has been disposed of and what disposition he has made of the proceeds; and until such inventory and affidavit shall be furnished to such officer, he shall not set apart any property to the execution defendant as exempt from execution."

In the case of *Citizens State Bank, etc. v. Harris* (1897),

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149 Ind. 208, 211, 48 N. E. 856, it is said: "Courts give a liberal construction to the law that exempts from sale on execution the property of a resident householder, as such an act is intended to protect the insolvent debtor and his family so that they may, in the language of our constitution, 'enjoy the necessary comforts of life.' Guided by this principle, this court has not limited the application of our exemption statute to cases only which fall directly within its strict letter, but has applied it to all such as come within the spirit and equity of the law, so as to promote and secure the object intended."

The rule in this State is where a judgment is founded upon contract, the judgment debtor, "if he is a resident householder, and his entire estate, real and personal,

3. of every kind and description whatever, within and without the state, does not exceed in value the amount which, under the law, he is authorized to claim as exempt from sale on such judgment, he may, before any such sale occurs, sell or dispose of any or all of his property, and the purchaser or person to whom the property passes, will take it free from the lien of the judgment, or the lien of any execution that may have been issued thereon. As to any real estate so disposed of

4. by such judgment debtor, the person to whom it has been conveyed may maintain an action to quiet his title against the lien of the judgment, provided he commences his suit for that purpose before the real estate is sold under the judgment." *Citizens State Bank, etc. v. Harris, supra*. See, also, *Moss v. Jenkins* (1897), 146 Ind. 589, 45 N. E. 789; *King v. Easton* (1893), 135 Ind. 353, 35 N. E. 181; *Dumbould v. Rowley* (1888), 113 Ind. 353, 15 N. E. 463; *Barnard v. Brown* (1887), 112 Ind. 53, 13 N. E. 401.

It appears from the record that appellant Central Trust and Savings Company obtained the judgment on August 28, 1907. On December 28, 1908, said Catt sold and conveyed the real estate in controversy to appellee. On May 7, 1910,

execution was issued and placed in the hands of the sheriff, who proceeded to advertise and sell the land to satisfy the judgment. On May 20, 1910, appellee filed her complaint enjoining said sheriff from making the sale. It is clear that appellee brought suit to quiet her title before sale of the real estate by the sheriff.

In the case of *Moss v. Jenkins, supra*, it is said on page 597: "The right of the purchaser of real estate, which the vendor could have claimed as exempt from sale on

5. execution, to maintain an action commenced before the execution sale to quiet his title to such real estate as against such lien rests upon equitable principles, and is not declared by the statute. *Barnard v. Brown, supra.*"

Appellee brought suit to quiet her title before the sheriff's sale, alleging in her complaint "that said judgment is not and at no time has been a lien upon said real estate or

6. upon any part thereof, or upon any interest therein."

This is sufficient, and it was not necessary for her to file a schedule showing the value of Catt's property before she could maintain this action, neither is the complaint bad for failing to allege this was done.

Appellants' objection that the entire nature of the
7. complaint is not clear, could have been cured in the court below by motion to make more specific. The demurrers were properly overruled.

Appellants insist that the court erred in overruling their motions for a new trial for the following reasons: (1) It

was error to admit any evidence as to the value of the
8. property, because no schedule had been made or tendered to the sheriff at any time before or after the sale of the real estate, showing it to be exempt from execution. (2) The decision of the court is not sustained by any evidence.

As to the first contention, evidence of the value of Catt's real estate was properly admissible under the allegations of appellee's complaint as tending to prove that the judgment

was not and had at no time been a lien on the same, although we cannot commend the complaint as a model pleading. If

there is any evidence to sustain the finding of the

9. court, the judgment will not be disturbed. The evi-

dence discloses that the real estate in controversy was

10. of the value of from \$1,000 to \$1,200. It was sold

and conveyed to Catt for \$1,200, subject to a mortgage of \$800. It is also fairly shown that this was the only real property said Catt owned, and under the law his wife, Callie J. Catt, was entitled to one-third of it, consequently his interest in the real property was worth less than \$600.

Appellant earnestly insists that it was not shown what personal property said Catt owned, and this presents a serious question. The evidence on this point is as follows:

“Q. You may state whether or not you owned any personal property at that time, unincumbered? A. No, sir. Q. You had no personal property, unincumbered? A. No, sir.” A careful examination of the record fails to disclose any further evidence as to the value of Catt’s personal property. Clearly this is insufficient to show that the real estate in question was exempt from execution. For aught that appears, Catt may have had incumbered personal property of sufficient value to defeat his right to exemption. The decision is therefore not sustained by the evidence.

Judgment reversed, with instructions to sustain appellants’ motion for a new trial.

NOTE.—Reported in 101 N. E. 108. See, also, under (1) 2 Cyc. Anno. 1013-New; (2) 18 Cyc. 1380; (3, 4, 5, 6, 10) 18 Cyc. 1448; (7) 31 Cyc. 718; (9) 3 Cyc. 360. As to whether the proceeds of sale of exempt property are subject to levy, see 66 Am. St. 381.

**LAWLOR ET AL. v. STATE OF INDIANA, EX REL.
SHATTO.**

[No. 7,657. Filed October 18, 1912. Rehearing denied January 30, 1913. Transfer denied March 12, 1913.]

1. **INTOXICATING LIQUORS.—Unlawful Sales.—Action for Damages.—Evidence.—Sufficiency.**—In an action on a liquor dealer's bond for injury to means of support by the unlawful sale of liquor, evidence, though conflicting, which showed that the husband and father of the plaintiffs had been drinking intoxicants before going to the saloon, that he remained in the saloon about four hours, playing cards and drinking at intervals, that he was so drunk that he staggered and fell to the ground when he was put out of the saloon, that as he walked toward the railroad he staggered, and that shortly afterwards his mangled body was found on the railroad tracks, was sufficient to warrant the jury in finding that his death resulted as a consequence of his intoxication. p. 27.
2. **INTOXICATING LIQUORS.—Unlawful Sales.—Action for Damages.—Principal and Agent.—Sale by Agent.—Evidence.**—In an action on a liquor dealer's bond to recover for injury to means of support by the unlawful sale of liquor, evidence showing that a license was issued to the dealer to conduct a saloon where the liquor was sold, that a saloon was opened and conducted at that place, and that the sale complained of was made by a person in charge within the term covered by the license, is sufficient *prima facie* to show that the place was conducted under the license granted to such dealer, and that the person in charge was his agent or employe. p. 27.
3. **INTOXICATING LIQUORS.—Unlawful Sales.—Action for Damages.—Evidence.—Prima Facie Case.—Rebuttal.**—Where, in an action on a liquor dealer's bond for injury to means of support by the unlawful sale of liquor, the evidence showed *prima facie* that the place where liquor was sold was conducted under the license issued to the defendant dealer and that the person in charge was his agent or employe, the question of whether a bill of sale introduced in evidence, and the testimony of the person in charge that on the date shown by such bill of sale he had purchased the saloon and had since conducted it on his own accord and that immediately after such purchase the defendant dealer removed his license and left the State, but which was in part discredited by the testimony of another witness showing that the bill of sale was not executed on the date which it bore, was suf-

sufficient to rebut the *prima facie* case made by plaintiffs, was for the jury, and it cannot be held on appeal that its finding for plaintiffs on such question is not warranted by the evidence. pp. 28, 29, 30.

4. WITNESSES.—*Credibility.—False Testimony.—Effect.*—Where a jury believes that a witness testified wilfully to a falsehood as to certain matters, it has a right to disregard his entire testimony. p. 29.
5. WITNESSES.—*Credibility.—Weight of Testimony.*—The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given to their testimony. p. 29.
6. APPEAL.—*Review.—Evidence.—Verdict.*—A verdict will not be set aside on appeal for want of evidence on any point on which the evidence is conflicting. p. 29.
7. INTOXICATING LIQUORS.—*Rights of Dealer.—Sale of Stock and Fixtures.*—The owner of a saloon may lawfully sell the stock and fixtures and quit the business. p. 29.
8. INTOXICATING LIQUORS.—*Rights of Dealer.—Transfer of License.*—Prior to the act of 1911 (Acts 1911 p. 244) the statutes provided no means by which the holder of a license to conduct a saloon could transfer that license to another. p. 29.
9. INTOXICATING LIQUORS.—*Removal of Dealer.—Forfeiture of License.*—Removal from the State by one holding a retail liquor dealer's license works a forfeiture thereof, and it will thereafter afford no protection to a person who sells intoxicating liquors assuming to act as the agent of the owner of such license. p. 30.
10. INTOXICATING LIQUORS.—*Forfeiture of License.—Liability of Surety on Dealer's Bond.*—The forfeiture of a retail liquor dealer's license does not operate to relieve such dealer or his bondsmen from liability for damages resulting from an unlawful sale thereafter made under color of such license. p. 30.
11. INTOXICATING LIQUORS.—*Unlawful Sales.—Action for Damages.—Instructions.*—In an action on a liquor dealer's bond for damages growing out of the unlawful sale of liquor, an instruction that if the jury finds from the evidence that by reason of the acts of the defendants themselves, or of any one of them, by and with the knowledge and consent of the others expressed or implied, the license issued to the defendant dealer became inoperative and void, but that the unlawful sale, if any, was made by a person in charge of the saloon under color of such void license, defendants are estopped from asserting the invalidity of such license as a defense, was erroneous, since it warranted the jury in concluding that defendants were estopped to assert the invalidity of the license, without finding as a fact that the person in charge was acting as the agent of the defendant dealer, or that such defendant and his bondsmen had any knowledge

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that the business was being conducted under color of the license granted to him. pp. 30, 32, 34.

12. **INTOXICATING LIQUORS.—Sale of Business.—Sales Under Color of License.**—Where the holder of a saloon license sells his stock and fixtures to another who takes possession and operates the saloon on his own account at the place described in the license of the seller, such acts alone do not amount to conducting the business under color of the license of the seller, so as to render him and his bondsmen liable for damages resulting from illegal sales made by the purchaser. p. 32.

13. **APPEAL.—Review.—Instructions.—Refusal.**—Where requested instructions on a proposition correctly stated the law, and were not fully and fairly covered by instructions given, their refusal was error. p. 33.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Action by the State of Indiana, on the relation of Sadie Shatto and others, against Thomas Lawlor and others. From a judgment for relators, the defendants appeal. *Reversed.*

Joseph E. Bell and *Shirts & Fertig*, for appellants.

Pond & Patter, *U. C. Stover* and *McCullough & Welborn*, for appellees.

LAIRY, J.—This action was brought in the Marion Circuit Court on a retail liquor license bond, executed by appellant Thomas Lawlor, as principal, and appellants Terre Haute Brewing Company and Maurice Donnelly, as sureties. The suit was instituted by the widow and minor children of Jesse Shatto, deceased, to recover damages for the loss of their means of support. It was alleged that decedent was killed by a switch engine while he was intoxicated, and that such intoxication was produced by liquor illegally sold to him by Lawlor or his agents.

The complaint was in one paragraph, and appellants answered in general denial. On motion for a change of venue the cause was transferred to the Hancock Circuit Court, where a trial was had before a jury, a verdict returned, and judgment rendered in favor of appellees in the sum of \$1,500.

Appellants' motion for a new trial was overruled by the trial court, and this ruling is the only error assigned on appeal.

Appellants first contend that there is no evidence from which the jury was justified in finding that the death of Jesse Shatto resulted from the unlawful sales of in-

1. toxicating liquors made in the saloon described in the complaint. To this contention we cannot agree. The evidence shows that Jesse Shatto, in company with a man named Curtis, went to a saloon on the northwest corner of Martindale Avenue and Nineteenth Street about 4.30 o'clock on the afternoon on which he was killed. According to the testimony of Curtis, they both had been drinking intoxicants before they went to this saloon, and, from the conduct of Shatto as described by this witness, the jury may have properly found that he was somewhat intoxicated at that time. They remained there, as shown by the evidence, playing cards and drinking at intervals, until about 8:30 o'clock, when the wife of Curtis came to the saloon and took her husband away. She and her daughter who was with her testified that both Shatto and Curtis were so drunk at that time that they staggered and fell to the ground after they were put out of the saloon, and that the last they saw of Shatto, he was walking or staggering west on Nineteenth Street toward the railroad. About 9:30 o'clock his dead body was found on the tracks of the Lake Erie and Western Railway Company near his home, by the crew of a switch engine. The yardmaster who was with this crew testified that Shatto's skull was fractured, and that he found blood and brains on the rear footboard of the engine. From this evidence the jury was justified in finding that the death of Shatto resulted as a consequence of his intoxication. There is a conflict in the testimony, but there is ample evidence to sustain the verdict on this point.

The death of Shatto occurred on December 13, 1907. It is not disputed that the Board of Commissioners of the County of Marion at its January term, 1907, grant-

2. ed to Thomas Lawlor a retail liquor license to conduct a saloon for the period of one year at the southwest

corner of Martindale Avenue and Nineteenth Street, and that he filed a bond with his coappellants as sureties thereon; but appellants claim that the undisputed evidence shows that Lawlor was not conducting a saloon at that place on December 13, of that year, and that the place was being conducted at that time by Frank Glenn, to whom Lawlor had sold the stock and fixtures on July 17, 1907.

It is asserted by appellants that the burden rested on appellees to prove that the unlawful sale of liquor, which caused or contributed to the intoxication of Shatto, was made by the agent or servant of Thomas Lawlor, and that there is no evidence tending to prove such fact. To make a *prima facie* case on this point, it is sufficient to show that a license was granted to him to conduct a saloon at the place where the liquor was sold, and that a saloon was opened and conducted at that place, and that the sale was made by a person in charge within the term covered by the license. The evidence tended to prove these facts and justified the inference that the place was being conducted under the license granted to Lawlor, and that the person in charge was his agent or employe.

To rebut the *prima facie* case thus made, the appellants called Frank Glenn as a witness who testified that on July 17, 1907, he purchased the stock and fixtures of the

3. saloon in question from Thomas Lawlor, for \$650 in cash, and that he took charge at that time and continued thereafter so to conduct it as the sole proprietor, and that he was so conducting it on December 13, 1907. He further testified that at the time Lawlor sold out to him a bill of sale was executed, which he identified and which was introduced in evidence. This bill of sale bears date of July 17, 1907, and this witness testified that it was signed and delivered on that date, and that it had been in his possession ever since. He also testified that when the sale was made, Lawlor took his license and left the place and had not been there since, and there was other evidence tending

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to prove that Lawlor left the State. This evidence tended to rebut the *prima facie* case made by appellees, and to show that the sales in question were not made by Lawlor or by his agents or servants; but the testimony of Glenn was discredited by the testimony of T. J. Carter, who testified that he worked for William B. Burford, and that the form of the bill of sale was printed by that firm. He further testified that the form was not printed until August, 1908, as shown by letters at its head. The jury may have

4. believed that Glenn wilfully testified to a falsehood in reference to the date of the execution and delivery of the bill of sale. If the jury so believed, it had a right to disregard the entire testimony of this witness. *Lemmon v. Moore* (1884), 94 Ind. 40; *Mercer v. Wright* (1854), 3 Wis. *645; *Stoffer v. State* (1864), 15 Ohio St. 47, 86 Am. Dec. 470.

It was for the jury to say whether the evidence introduced by the defendant was sufficient to rebut the *prima facie* case made by plaintiffs; it was

5. the exclusive judge of the credibility of the witnesses and of the weight to be given to the testimony. Under the evidence the jury may have found that the sale concerning which Glenn testified was a sham, and that no *bona fide* sale of the stock and fixtures had actually been made, and that the evidence of such sale had been manufactured as a defense to this action. This court will not set aside

6. a verdict for want of evidence on any point on which the evidence is conflicting. *Wolcott v. Hayes* (1909), 43 Ind. App. 578, 88 N. E. 111; *Cleveland, etc., R. Co. v. Gossett* (1909), 172 Ind. 525, 87 N. E. 723. The

7. owner of a saloon may lawfully sell the stock and fixtures and quit the business. *Pierce v. Pierce* (1897), 17 Ind. App. 107, 46 N. E. 480.

Prior to the act of 1911 (Acts 1911 p. 244), the

8. statutes of our State provided no means by which the holder of a license to conduct a saloon could transfer

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that license to another. *Godfrey v. State* (1839), 5 Blackf. 151; *Pickens v. State* (1863), 20 Ind. 116.

If the holder of a retail liquor license removes from the State, he thereby forfeits such license, and no judicial proceeding is necessary to declare such forfeiture. Such

9. license affords no protection to a person who sells intoxicating liquors assuming to act as the agent of the owner of such license. *Krant v. State* (1874), 47 Ind. 519.

Appellants claim that as the evidence shows that Lawlor was a nonresident of the State, his license was void, and that both he and his bondsmen were for that reason
10. relieved from any liability growing out of the conduct of the business. While it is true that such license affords the agent of the nonresident holder no protection against a criminal prosecution, it cannot be said that the holder of such license or his bondsmen can escape liability for damages resulting from an unlawful sale made by the agent of such a nonresident license holder under color of such license. To permit such a defense would be to permit a party to reap a benefit from his own wrong. *State, ex rel. v. Golding* (1902), 28 Ind. App. 233, 62 N. E. 502.

If the jury found that no good-faith sale had been
3. made by Lawlor, and that on December 13, 1907, the saloon in question was being operated by him or his agents, the verdict in favor of appellees is correct. This question seems to have been fairly submitted to the jury by the instructions and there is evidence from which the jury may have decided the question either in favor of appellants or appellees.

If the jury found that the sale by Lawlor to Glenn was valid and made in good faith, and that Glenn at once took possession and control of the saloon, this would ren-
11. der void the license granted to Lawlor, or would, at least, suspend its operation. If Glenn undertook to operate the saloon without procuring a license, he would be

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liable to arrest and prosecution for every sale made without such license. The question then arises, Can Lawlor, the original licensee, and his bondsmen be held liable on the bond for civil damages resulting from a sale of liquor made by Glenn after the transfer of the saloon and at a time when he was operating it without a license? On this question the court gave to the jury the following instruction: “(17) Upon a suit on the bond of a retail liquor dealer for damages caused by the unlawful sale of intoxicants by such dealer, the principal and sureties on such bond are estopped to set up as a defense to such action that the license upon which such bond is based is void. And in this action, if you find from the evidence that by reason of the acts of the defendants themselves, or of any one of them, by and with, the knowledge and consent of the other defendants expressed or implied, the license issued to defendant Lawlor, if any, became inoperative, or void, but the sales complained of in plaintiff’s complaint, if any, were made by one Glenn under color of such void license, then I instruct you the defendants are estopped from setting up the invalidity of such license if any, as a defense in this action.”

In giving this instruction the court, no doubt, relied on the authority of *State, ex rel., v. Golding* (1902), 28 Ind. App. 233, 60 N. E. 502. In that case a saloon license had been granted to two persons as partners, and the partnership opened and conducted a saloon at the place described in the license and under its apparent authority. The firm and its bondsmen were sued for civil damages resulting from a sale of intoxicating liquors unlawfully made during the time said firm was so operating the saloon, and a defense was attempted on the ground that the license granted to the partnership was void for the reason that the statute requires that such licenses can be granted only to individuals and not to firms or corporations. The court held that by accepting the license and transacting business thereunder the firm had estopped itself and its bondsmen from denying its validity.

It is clear that at the time the unlawful sale was made the partnership was conducting the business under color of a license granted to such firm.

In this case, if Lawlor, while the holder of a saloon license, became a nonresident of the State, such license would *ipso facto* become void, and would afford no protection to his agent in conducting the business; but if Lawlor in his absence left Glenn as his agent to conduct the business under authority and for his benefit, we would have no hesitancy in saying that the business so conducted would be under color of the license granted to Lawlor, and that both he and his bondsmen would be estopped from asserting the invalidity of the license on account of the absence of Lawlor from the State. If the instruction under consideration is intended to apply to this phase of the evidence, it is defective. The instruction warrants the jury in concluding that Lawlor and his bondsmen were estopped from setting up the invalidity of the license, without finding as a fact that Glenn was acting as his agent at the time he made the sale, or that Lawlor or his bondsmen had any knowledge that the business was then being conducted under color of the license granted to Lawlor.

Whether or not a stranger to a liquor license may, under any circumstances, conduct a saloon under color of a license granted to another, is a question we are not now

12. called on to decide. It is quite clear, we think, that where a holder of a saloon license sells his stock and fixtures to another who takes possession and operates the saloon on his own account at the place described in the license of the seller, that such acts alone do not amount to conducting the business under color of the license of the seller, so as to render the seller liable on his bond for damages resulting from illegal sales made by the purchaser.

Under the evidence in this case, if Glenn made the illegal sale under color of Lawlor's license, it is quite clear

11. that he must, at the time, have been acting either as the agent of Lawlor or the owner or proprietor

of the saloon. We have seen that the instruction is erroneous when applied to him as the agent of Lawlor. If we treat Glenn as the owner and proprietor of the saloon, it is quite clear, we think, that the sale in question cannot be said to have been made under color of Lawlor's license in the absence of a finding by the jury that Lawlor had attempted to assign his license to Glenn, or that he had knowingly permitted Glenn to hold himself out as his agent, or that he had in some other way aided or assisted Glenn in giving to the place the appearance of a saloon conducted under his license. If we apply this instruction to Glenn as the proprietor of the saloon, it is erroneous, for the reason that it probably led the jury to believe that a recovery on the bond was authorized upon a mere showing that the saloon was being conducted by Glenn under color of license at the time the sale complained of was made, and without any requirement that the jury should find that Lawlor or his bondsmen knew of such fact or were connected in any manner therewith.

The instructions given did not fully and fairly state the law governing the facts of this case. Instruction No. 10, requested by appellants, properly states the law and 13. should have been given. The instruction is as follows: "A person holding a retail liquor license and who operates a saloon thereunder may sell out his stock of goods and fixtures and quit such business at any time, and the fact of the existence of such former license could not of itself prohibit some other person from carrying on a saloon business in the place for which such license had existed, and the fact that such new saloon business might be carried on unlawfully would not render the former holder of the former license liable therefor, provided he did not have any connection therewith." Appellants requested a number of instructions which stated the same proposition in various forms, but the court refused to give any instruction which

embodied the proposition stated in the instruction quoted. This was error.

The record does not show affirmatively that the jury found that the sale of the stock and fixtures was not made in good faith. If it did, we might hold instruction No. 17

11. harmless. Under the evidence the jury may have found that such sale was *bona fide*, and it may have rested its verdict on the ground that the purchaser of the stock and fixtures made the sale of liquor charged in the complaint under color of the license. We cannot, therefore, say that the instruction was harmless, or that it did not influence the verdict.

Some other questions raised by the instructions are presented. To consider the objection to each of the instructions separately would unduly extend this opinion. Sufficient has been said to enable the lower court to avoid error on another trial of this case.

The judgment is reversed, with directions to grant a new trial.

Judgment reversed.

NOTE.—Reported in 99 N. E. 487. See, also, under (1) 23 Cyc. 326; (2, 3) 23 Cyc. 325; (4) 40 Cyc. 2586; (5) 38 Cyc. 1518; (6) 3 Cyc. 348; (7) 23 Cyc. 334; (8) 23 Cyc. 154; (9) 23 Cyc. 114; (10) 23 Cyc. 145; (11) 23 Cyc. 331; (12) 23 Cyc. 114; (13) 38 Cyc. 1718. As to statutory right of action against liquor seller had by relative of person sold to, see 48 Am. Dec. 625. For a discussion of furnishing liquor as the proximate cause of injury under civil damage acts, see 3 Ann. Cas. 59; 13 Ann. Cas. 200.

SOUTHERN RAILWAY COMPANY v. ELLIS.

[No. 7,861. Filed March 13, 1913.]

1. CARRIERS.—*Injury to Passengers.—Verdict.—Answers to Interrogatories.*—In a passenger's action against a railroad company for injuries sustained while alighting from a train, answers to interrogatories that the train did not stop a reasonable time for plaintiff to alight, that it was moving when she reached the coach platform, that its speed was three miles an hour and was in-

creasing as she descended the steps, that there was an unusual jerk of the train while she was on the coach steps, that she went down the steps for the purpose of alighting and at the time was confused and excited, that she did not step off the train, but was forced to jump by a lurch of the coach, and that she was not thrown from the coach by a sudden or violent movement of the train, are not in irreconcilable conflict with a verdict for plaintiff. pp. 38, 39.

2. **TRIAL.—General Verdict.—Scope and Effect.**—The general verdict covers the whole issue and solves every material fact against the party against whom it is rendered. p. 38.
3. **TRIAL.—General Verdict.—Answers to Interrogatories.—Control.**—To enable a party against whom a general verdict is rendered to successfully interpose the special findings on particular questions of fact, as ground for judgment in his favor, such special findings must stand in such clear antagonism to the general verdict that the two cannot coexist. p. 38.
4. **APPEAL.—Review.—Presumptions.—General Verdict.—Answers to Interrogatories.**—All reasonable presumptions will be indulged in favor of the general verdict and against the answers to interrogatories, and if the general verdict thus aided is not in irreconcilable conflict with such answers, it must stand. p. 39.
5. **CARRIERS.—Injury to Passengers.—Instructions.—Care Required.**—In a passenger's action for personal injuries sustained in alighting from a train, an instruction that it was the duty of those in charge of the train to see and know at the time that no passenger was in the act of alighting before signaling the engineer and putting the train in motion, was erroneous in that it imposes a higher duty than the law exacts and does not distinguish between the duty to be performed and the care required in its performance. p. 39.
6. **APPEAL.—Review.—Harmless Error.—Instructions.**—Where it appears that a verdict was returned on one of two charges of negligence contained in the complaint, the giving of an erroneous instruction applicable only to the other charge, is harmless. p. 40.
7. **CARRIERS.—Injury to Passengers.—Duty to Passenger Alighting From Train.**—A railroad company owes to its passenger the duty of stopping the train a reasonable time to enable the passenger to alight before again putting the train in motion, and the failure to perform such duty is negligence and renders the company liable for injuries proximately resulting. p. 40.
8. **CARRIERS.—Injury to Passengers.—Answers to Interrogatories.—Instructions.—Harmless Error.**—Where, in a passenger's action for injuries sustained in alighting from a train, it appears from the jury's answers to interrogatories that the proximate cause of the injury was the starting of the train before plaintiff had time

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to alight, and the lurching of the same which forced plaintiff to jump, an erroneous instruction applicable only to the alleged negligence of defendant in not having a servant on the ground or platform when plaintiff attempted to alight, was harmless. p. 40.

9. **CARRIERS.—Injury to Passengers.—Instructions.—Refusal of Instructions.**—In a passenger's action for injuries sustained in alighting from a train, where the court instructed that if the train was in motion when the plaintiff reached the car door, she should have returned to her seat and remained there until the car stopped, that a passenger is as much bound to use care to avoid injury as a carrier is bound to use care to prevent injury, and must act as a person of ordinary prudence would act under the circumstances in order to recover, the refusal of defendant's requested instructions that on the facts detailed plaintiff, as a matter of law, was guilty of contributory negligence, and that if a reasonably prudent woman, under the circumstances detailed, would not have encountered the risk that plaintiff encountered in attempting to alight, plaintiff was guilty of contributory negligence, was not erroneous. p. 41.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by Amanda L. Ellis against the Southern Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Alex P. Humphrey, Edward P. Humphrey, John D. Welman, Thomas Duncan and Richard M. Milburn, for appellant.

Cox & Armstrong and B. W. Pickhardt, for appellee.

ADAMS, J.—Appellee, accompanied by her husband and two small children, became a passenger on one of appellant's trains at French Lick, Indiana, having a ticket which entitled her to be carried to Cuzco, a station on appellant's line of railroad a few miles south of French Lick. Appellee charges in her complaint that when the station of Cuzco was announced, and the train had come to a stop, she went forward to the door of the coach in which she was riding, for the purpose of leaving the train; that the train stopped for a moment only, and when she reached the platform of the coach the train was slowly moving forward. Believing

that the train was about to stop a few feet south of the place where the first stop was made, she proceeded carefully and cautiously down the steps, holding to the hand-rail attached to the platform of the coach, intending to alight when the train came to a full stop; that while standing on the second step, "defendant by and through its agents and servants in charge of said train negligently and carelessly suddenly started said train with a heavy lurch and jerk, while she was carefully and cautiously making her way down from the platform to and upon the steps, defendant knowing at said time that she was intending to get off of the train at Cuzco and knowing at the time that she was still on the platform or steps of said car attempting to get off thereof, and while in this position, without any fault or negligence upon her part, but solely on account and by reason of the carelessness and negligence of the defendant as hereinafter charged in suddenly starting said train with great force and velocity, she was thrown off and from said steps down to and upon the ground," sustaining injuries specifically described. Plaintiff charges defendant with negligence "in failing to stop said train a sufficient length of time to enable her to alight therefrom down to and upon the ground, and that defendant was further guilty of carelessness and negligence in its servants failing to stand upon the ground or upon the platform of said coach in such way and manner whereby they could see plaintiff and distinctly from the time she came out of the coach in which she had been riding to and upon the platform and steps of said car, defendant's servants well knowing at the time they started the train that she was attempting to alight therefrom." The court overruled defendant's demurrer to the complaint, and an issue of fact was formed by answer in general denial. The cause was submitted to a jury, and verdict returned in favor of plaintiff. With its general verdict the jury returned answers to certain interrogatories. Defendant moved the court for judgment on the answers to interrogatories, notwithstanding

the general verdict. This motion was overruled, and judgment was rendered on the general verdict. Defendant's motion for a new trial was overruled, and an appeal was prayed and granted to this court.

The errors assigned are: (1) overruling the demurrer to the complaint; (2) overruling the motion for judgment on the answers to interrogatories; (3) overruling the motion for a new trial. The first specification of error is not relied on, nor is it insisted that the proof does not disclose negligence on the part of appellant. Under the second specification of error, appellant urges that the answers to interrogatories returned with the general verdict, show that appellee was guilty of contributory negligence, and that said answers are in irreconcilable conflict with the general verdict.

By its special verdict, the jury found that the station was called; that the train stopped thirty seconds, which was not a reasonable time for plaintiff to alight; that the train

1. was moving when she reached the coach platform, and that she knew it; that the speed of the train was three miles an hour, and was increasing as she descended the steps, leading a four-year-old child; that there was no unusual jerk of the train when it started, but there was an unusual jerk while she was on the coach steps; that she went down the steps for the purpose of alighting; and at the time, she was confused and excited; that she did not step off on the station platform, but was forced to jump by a lurch of the coach; that she was not thrown from the coach by a sudden or violent movement of the train, but was forced to jump by a lurch of the same.

It is well settled that the general verdict necessarily

2. covers the whole issue, and solves every material fact against the party against whom it is rendered. To
3. enable the latter successfully to interpose the special findings on particular questions of fact, as a ground for judgment in his favor, the special findings must stand in such clear antagonism to the general verdict that the two

cannot coexist. *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662, 64 N. E. 92, and cases cited; *Indianapolis Union R. Co. v. Ott* (1895), 11 Ind. App. 564, 568, 38 N. E. 842, 39 N. E. 529; *Harmon v. Foran* (1911), 48 Ind. App. 262, 266, 94 N. E. 1050, 95 N. E. 597; *Ittenbach v. Thomas* (1911), 48 Ind. App. 420, 427, 434, 96 N. E. 21. All reasonable

presumptions will be indulged in favor of the general

4. verdict and against the special answers, and if the general verdict thus aided is not in irreconcilable conflict with the answers, it must stand. *City of South Bend v. Turner* (1901), 156 Ind. 418, 423, 60 N. E. 261, 54 L. R. A. 396, 83 Am St. 200.

Keeping in mind that the general verdict is a finding in favor of appellee on the whole issue presented by this case, and indulging every reasonable presumption and in-

1. tendment in favor of the general verdict, as required by the well-established rule declared in the foregoing cases, we think the special answers are not in irreconcilable conflict with the general verdict.

Appellant further urges that the court erred in overruling its motion for a new trial. The particular errors complained of and specified in the motion as grounds for a new trial relate to the giving of certain instructions and the refusal to give other instructions.

The fourth instruction given by the court pertained to the duty that appellant owed appellee, and was in part as follows: "It was the duty of those in charge of the

5. train to see and know at the time that no passenger was in the act of alighting from the train before the signal to the engineer and the putting the train of which he was in charge in motion." The instruction is clearly erroneous, in that it does not distinguish between the duty to do a certain thing and the care necessary to be exercised in the performance of such duty. The duty imposed by the instruction is higher than the law exacts. *Louisville, etc., Traction Co. v. Korbe* (1911), 175 Ind. 450, 453, 93 N. E.

5, 94 N. E. 768. Whether the giving of this instruction constitutes reversible error depends on whether it was applicable to the charge of negligence on which the verdict was returned. It will be noted that appellee's right to recover was predicated on two independent charges of negligence on the part of the servants of appellant: (1) in failing to stop the train for a sufficient length of time to enable appellee to alight therefrom, and (2), in failing to stand on the ground or on the platform of the coach when appellee came out, knowing at the time they started the train that she was

attempting to alight therefrom. If it appears from

6. the evidence or answers to interrogatories that the verdict was returned on the first charge of negligence, then the giving of the erroneous instruction was harmless, as it was applicable only to the second charge of negligence. *Ellis v. City of Hammond* (1901), 157 Ind. 267, 271, 61 N. E. 565; *Roush v. Roush* (1900), 154 Ind. 562, 573, 55 N. E. 1017; *Sievers v. Peters, etc., Lumber Co.* (1898), 151 Ind. 642, 662, 50 N. E. 877, 52 N. E. 399; *Putt v. Putt* (1897), 149 Ind. 30, 39, 48 N. E. 356, 51 N. E. 337.

Appellant owed appellee the duty of stopping a reasonable time to enable her to alight before again putting the train in motion, and failure to perform such duty was

7. negligence, on account of which there was a liability for injuries proximately resulting. *Lake Erie, etc., R. Co. v. Beals* (1912), 50 Ind. App. 450, 98 N. E. 433.

By its special verdict, the jury found that the train stopped thirty seconds at appellee's destination, and that thirty seconds was not a reasonable time for appellee

8. to alight. This was a direct finding that appellant was guilty of negligence. The jury further found specially that appellee did not jump from the car steps to the station platform, but was forced to jump by the lurch of the coach. It therefore fully appears from the special answers that the proximate cause of the injury was the starting of the train before appellee had time to alight, and the

lurching of the same in starting which forced appellee to jump. Appellant was not harmed by the erroneous instruction.

Complaint is also made of the refusal of the court to give certain instructions tendered by appellant on the issue of contributory negligence. By instructions Nos. 16, 17 and 18, requested by appellant and refused, the court was asked to say that on the facts detailed in said instructions appellee, as a matter of law, was guilty of contributory negligence. By instruction No. 19, requested by appellant and refused, the court was asked to declare the law to be that if a reasonably prudent woman, under the circumstances detailed in the other instructions, would not have undertaken to alight from the train, then appellee was guilty of contributory negligence. Instructions Nos. 21 and 23, requested by appellant and refused by the court, involved the same principle as instruction 19—that if a prudent woman, under the same circumstances, would not have encountered the risk that appellee did encounter in attempting to alight from a moving train, she was guilty of contributory negligence. It is insisted that the refusal to give each of said instructions is reversible error.

Appellant was clearly entitled to have the court instruct the jury on the question of contributory negligence, as well as on the facts which, if shown, would constitute contributory negligence. And if the court had given no instruction on this general subject, refusal to give the instructions requested would result in a reversal. But we think the court, by instruction No. 7, given on its own motion, fully covered the features included in the instructions refused.

By instruction No. 7 the court told the jury that it was the duty of appellee to remain seated in the car until the train was brought to a stop at the station, and it was then her duty to leave her seat with reasonable dispatch, pass out of the coach and get off of the train at the place where

passengers were accustomed to get on and off of appellant's trains. In this instruction, the court further said: "If, when the plaintiff reached the door of the coach in which she had been riding, the train was in motion, it was her duty to return to her seat and remain on the car until it was brought to a stand still, even though by so doing she would have been carried past said station and beyond her home. A passenger is as much bound to use reasonable care to avoid injury as the carrier is bound to use the greatest degree of skill and care to save passengers from harm. The passenger must think before he acts, and he is bound to think and act as a person of ordinary prudence would do under the circumstances. And if, after considering all the evidence, given in this case, you find by a fair preponderance thereof that she did not observe these rules, and did all or some of the things she ought not to have done, and doing them contributed to her injury, she would then be guilty of contributory negligence, as would prevent her recovery, and your finding should be for the defendant." While this instruction bears the evidence of haste in preparation, we think it is as favorable to appellant as the law warrants. We are satisfied that the cause was fairly tried on its merits, and a correct result reached.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 105. See, also, under (1) 38 Cyc. 1927; (2) 38 Cyc. 1869; (3) 38 Cyc. 1929; (4) 38 Cyc. 1901; (5) 6 Cyc. 612, 613; (6, 8) 38 Cyc. 1815; (7) 6 Cyc. 612; (9) 38 Cyc. 1711. As to carrier's duty to afford passenger time and place to alight on leaving train, see 7 Am. St. 832. On the question of the carrier's duty to see that passenger has alighted before starting train at station, see 25 L. R. A. (N. S.) 217. As to the time allowed passenger to alight, see 4 L. R. A. (N. S.) 140. As to the duty of a railroad company to allow passenger time to board or alight from trains, see 7 Ann. Cas. 760; 14 Ann. Cas. 962; Ann. Cas. 1912 C. 794.

FIGGINS v. FIGGINS.

[No. 7,868. Filed March 13, 1913.]

1. **DEEDS.—Construction.—Intention of Parties.**—In construing a deed, the words employed should be given their fair, usual and reasonable meaning, and the intention of the parties, if discernible and not unlawful, should be effectuated. p. 45.
2. **DEEDS.—Construction.—Interest Conveyed.**—A deed reciting that the grantors convey and warrant to the grantee for life, and that, at the death of the grantee, the real estate conveyed is to revert to the right, title and interest of grantee's son, without process of law, conveyed a life estate to the grantee and the fee simple to her son. p. 45.
3. **LIFE ESTATE.—Payment of Taxes.—Duty of Tenant.**—The taxes on real estate should be paid by the life tenant during the occupancy by such tenant, and failure to do so creates a lien in the first instance against his interest in the real estate. p. 46.
4. **TAXATION.—Tax Sales.—Time for Redemption.—Infancy.**—The time within which an infant or other person suffering under legal disability may redeem from a tax sale, is two years after the removal of the disability. p. 46.
5. **TAXATION.—Tax Sales.—Disability of Owner.—Tax Deeds.—Duty of Auditor.**—The county auditor has no authority to determine whether a landowner is suffering under disability, but he must, on request, issue the tax deed, after expiration of two years from date of sale. p. 46.
6. **TAXATION.—Tax Sales.—Redemption.—Quieting Title.**—If the time has not expired in which the owner by reason of his disability may redeem his land from sale for taxes, the holder of the tax deed cannot quiet title against him. p. 46.
7. **APPEAL.—Review.—Exceptions to Conclusions of Law.**—The trial court's conclusion that the law is with defendants, correct as to one defendant, but not as to the other, will not be disturbed where separate exceptions were not reserved by plaintiff. p. 46.

From Greene Circuit Court; *Charles E. Henderson*, Judge.

Action by Jesse Figgins against Elizabeth Figgins and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

William L. Slinkard, for appellant.

Webster V. Moffett, for appellees.

SHEA, J.—This was a suit to quiet title brought by appellant Jesse Figgins against appellees. Issues were formed by a complaint in two paragraphs, answer in general denial by appellees, Ona Figgins and Russell Figgins, the latter by his guardian *ad litem*, and a default by appellees, Elizabeth and James Figgins, to the complaint. A special finding of facts was made by the court, conclusion of law stated thereon, and judgment rendered in favor of appellees.

Appellant assigns that the court erred in its conclusion of law on the finding of facts. The facts found are, substantially, that on February 15, 1901, the title to the real estate described in the complaint was in William Hunter and Francis Hunter, who, on said day, their wives joining, by warranty deed conveyed and warranted to Elizabeth Figgins the property in question “for life—and at her death said real estate to revert to the right, title and interest of Russell Figgins, her son, without process of law.” Prior to February 12, 1906, the taxes on the real estate became delinquent, and the same was duly sold on that day by the auditor and treasurer of Greene County, Indiana, to appellant Jesse Figgins, a tax-title deed being delivered and executed to him by said auditor and treasurer which was recorded in the recorder’s office of Greene County. On December 29, 1908, Elizabeth Figgins, her husband, James Figgins, joining, executed to appellant, Figgins, their quitclaim deed for the consideration of \$1 named therein, which deed was duly recorded, and he has been the owner of said real estate and of the interest of Elizabeth Figgins, ever since, according to the terms of said deed. Russell Figgins named in the deed from Hunter and Hunter to Elizabeth Figgins, was the latter’s son, and died April 28, 1903, leaving surviving him as his only heirs at law his widow Ona Figgins, and a posthumous child Russell Figgins, both appellees herein; that appellant Jesse Figgins paid at the tax sale as and for delinquency on said real estate the sum of \$15.59, and afterwards at various times paid certain sums aggregating \$9.49; that

he has been in possession of the real estate for about one year, and Elizabeth Figgins has been living thereon ever since February 15, 1901. The deed from Hunters to Elizabeth Figgins, which is set out in the special findings, contains the following language—grantors “convey and warrant to Elizabeth Figgins—for life—and at her death said real estate to revert to the right, title and interest of Russell Figgins, her son, without process of law.”

In the construction of deeds, the words employed

1. should be given their fair, usual and reasonable meaning. *Evans v. Dunlap* (1905), 36 Ind. App. 198, 75 N. E. 297; *Tinder v. Tinder* (1892), 131 Ind. 381, 30 N. E. 1077. It is the duty of the court to effect the intention of the parties if it can be discovered, and does not contravene any rule of law. *Elsea v. Adkins* (1905), 164 Ind. 580, 74

N. E. 242, 108 Am. St. 320. The language used in

2. the deed is awkward, but fairly construed, it is our judgment that it conveyed to Elizabeth Figgins a life estate, the fee simple to Russell Figgins. *Evans v. Dunlap, supra*; *Adams v. Merrill* (1910), 45 Ind. App. 315, 322, 85 N. E. 114, 87 N. E. 36; *Burns v. Weesner* (1893), 134 Ind. 442, 445, 34 N. E. 10; *Doren v. Gillum* (1893), 136 Ind. 134, 35 N. E. 1101.

The special findings of fact disclose that during the occupancy of Elizabeth Figgins as such life tenant, the taxes upon the real estate in question became delinquent. It was sold by the auditor and treasurer of Greene County, and purchased by Jesse Figgins; that Russell Figgins named in the deed from Hunters died on April 28, 1903, leaving surviving him his widow, Ona Figgins, and a posthumous child, Russell Figgins, appellees herein; that on December 29, 1908, Elizabeth Figgins, her husband joining therein, executed to appellant, Jesse Figgins, her quit-claim deed for \$1 consideration named, conveying the real estate described in the complaint; that Jesse Figgins has ever since been the owner of the interest of Elizabeth Figgins according to the terms

of the deed, and had been in possession of the real estate for about a year; that Elizabeth Figgins has been living on the real estate since February 15, 1901.

The taxes on the real estate should have been paid by the life tenant during her occupancy thereof, and her failure to do so, created a lien in the first instance upon her

3. interest in said real estate. The special findings of fact also disclose definitely that appellee, Russell Figgins, was at the time in question, and still is, an
4. infant. The time within which an infant or other person suffering under legal disability may redeem from a tax sale, is two years after the removal of the dis-
5. ability. The deed was delivered to the appellant in this case because the auditor has no authority to determine whether a landowner is suffering under disability and must, when requested, issue the tax deed, after expiration of two years from the date of sale. *Lancaster v.*

DuHadway (1884), 97 Ind. 565. It is settled that if
6. the time, in which the owner by reason of his disability may redeem, has not expired, there can be no quieting of title against him by the holder of the tax deed. *Wagner v. Stewart* (1895), 143 Ind. 78, 42 N. E. 469; *Schissel v. Dickson* (1891), 129 Ind. 139, 28 N. E. 540; *Ristine v. Johnson* (1895), 143 Ind. 44, 41 N. E. 538, 42 N. E. 310; *Macy v.*

Lindley (1913), 54 Ind. App. —, 99 N. E. 790. The
7. law is correctly stated with respect to the infant defendant. Separate exceptions were not reserved, so it must be held to be good as to both defendants.

The case was fairly tried, and a correct result was reached. The conclusion of law was correctly stated. Judgment affirmed.

NOTE.—Reported in 101 N. E. 110. See, also, under (1) 13 Cyc. 601, 605, (2) 13 Cyc. 646; (3) 16 Cyc. 632; (4) 37 Cyc. 1390; (5) 37 Cyc. 1422; (6) 37 Cyc. 1488; (7) 38 Cyc. 1990. As to life tenant's duty to pay taxes, see 114 Am. St. 448; 32 L. R. A. 744.

HENRY, RECEIVER, v. HACK, ADMINISTRATOR.

[No. 7,774. Filed December 18, 1912. Rehearing denied March 18, 1913.]

1. **APPEAL.—Review.—Ruling on Motion for Judgment on Answers to Interrogatories.**—Whether the trial court erred in overruling a motion for judgment on the answers to interrogatories is to be determined from a consideration of such answers, the general verdict, and the pleadings tendering the issues of fact. p. 48.
2. **TRIAL.—General Verdict.—Scope.**—A general verdict for plaintiff is a finding that every material averment of the complaint was proved. p. 49.
3. **TRIAL. — Verdict. — Answers to Interrogatories. — Control.** — A general verdict is not overcome by answers to interrogatories unless the latter are in such conflict with the former as to be irreconcilable upon any supposable state of facts provable under the issues. p. 49.
4. **RAILROADS.—Crossing Accidents.—General Verdict.—Answers to Interrogatories.**—Where, in an action for the death of plaintiff's decedent in a crossing accident, the complaint alleged facts showing that decedent's team had become frightened and had gotten beyond his control, and proceeded on the theory that the decedent was without fault in entering upon the track and that defendant's motorman either saw the peril of decedent in time to have prevented the collision by the exercise of ordinary care, or was guilty of original negligence in failing to discover and see decedent's peril, when by the exercise of reasonable care he should have done so, and that such negligence was the proximate cause of the death, answers to interrogatories showing that decedent was carried onto the track by his unruly horses, that freight cars on an adjacent steam road prevented the motorman from seeing decedent until he was less than fifty feet away, and that such motorman thereupon did all that he could to stop the car and avoid the injury, are not in irreconcilable conflict with a verdict for plaintiff, since they do not contradict the finding of the general verdict as to negligence in failing to see decedent's peril in time to have prevented the injury. p. 49.
5. **RAILROADS.—Crossing Accidents.—Unruly Team.—Look and Listen Rule.**—The look and listen rule applicable to the usual crossing cases, has no application where the entry upon the railroad track is due to a frightened team that has gotten beyond the driver's control, so that contributory negligence of a decedent, who was taken upon the track by an unruly team, is not necessarily shown by answers to interrogatories from which it does not appear that decedent stopped to look and listen. p. 54.

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6. RAILROADS.—*Crossing Accidents.—Perilous Position.—Duty of Railroad Employee.—Negligence.*—Where decedent was without fault placed in a perilous position upon a railroad track, the fatal consequences of which could have been seen and prevented by the motorman in the exercise of ordinary care, but which were not seen by him in time, no amount of care exercised after he saw can excuse his failure to see the peril in time to prevent the injury that followed. p. 54.
7. RAILROADS.—*Crossing Accidents.—Notice of Peril.*—A railroad company, as well as a person crossing its tracks, are each charged not only with actual knowledge, but with such knowledge as may be acquired by the exercise of ordinary care. p. 55.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Action by George Hack, administrator of the estate of Henry G. Reasoner, deceased, against Charles L. Henry, receiver of the Indianapolis and Cincinnati Traction Company.

From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Cook & Cook and *Claude Cambern*, for appellant.

Jackson & Sample and *Edward C. Eikman*, for appellee.

HOTTEL, J.—Appellee obtained judgment in the court below for \$3000 damages for the death of Henry G. Reasoner, caused by a collision at a highway crossing over appellant's interurban tracks, from which judgment this appeal is prosecuted. A motion was made by appellant in the court below for judgment on the answers of the jury to interrogatories notwithstanding the general verdict, which was overruled and exceptions properly saved. The ruling on this motion is properly assigned as error and presents the only question

relied on for reversal. This question is presented by

1. and determined from a consideration of such answers to interrogatories, the general verdict and the pleadings tendering the issues of fact, which, in this case, is a complaint in one paragraph and a general denial thereto. *Indiana R. Co. v. Maurer* (1903), 160 Ind. 25, 25 N. E. 156; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297,

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300, 53 N. E. 235; *Southern R. Co. v. Utz* (1913), 52 Ind. App. 270, 98 N. E. 375; *Indianapolis Southern R. Co. v. Emmerson* (1913), 52 Ind. App. 403, 98 N. E. 895.

Inasmuch as the only answer is a general denial the only pleading to be considered is the complaint, and appellee has in his favor the general verdict which is a finding

2. that every material averment of such complaint was proven. The presumption indulged in favor of this general verdict, so frequently announced by the

3. Supreme Court and this court, will not permit its overthrow by such answers to interrogatories unless there exists a conflict between the two, irreconcilable upon any supposable state of facts provable under the issues. *Ohio, etc., R. Co. v. Trowbridge* (1890), 126 Ind. 391, 398, 26 N. E. 64; *Shoner v. Pennsylvania Co.* (1892), 130 Ind. 170, 181, 28 N. E. 616, 29 N. E. 775; *Consolidated Stone Co. v. Summit, supra*, 304; *Southern R. Co. v. Utz, supra*, 378. It is contended by appellant that such conflict exists in two essential respects, one affecting the question of appellant's negligence and the other affecting the question of the contributory negligence of appellee's decedent.

The averments of the complaint important in determining whether such conflict exists are in substance as follows:

that at the crossing in question it was necessary for

4. a traveler on said highway going north before crossing appellant's track to pass over the tracks of the Cincinnati, Hamilton and Dayton Railway Company and its switch, both lying on the south of appellant's track; that on said day about the hour of 11 a. m., appellee's intestate, was driving a wagon drawn by two horses, and when about to cross appellant's track at said crossing, stopped to permit a car on appellant's track going east to pass him, and also waited for an east-bound train on the track of the Cincinnati, Hamilton and Dayton Railway to pass; that immediately after said train of cars going east passed, intestate's horses,

which he had driven in a prudent manner, became frightened and unmanageable and started across the tracks of appellant and while they were so unmanageable, ran intestate's wagon upon said track; that at that time appellant was running a car in a westerly direction on said track at a high and dangerous rate of speed, fifteen miles per hour, approaching said crossing; that intestate and his horses and wagon were in plain view of the agents of appellant in charge of said car for a distance of over 200 feet, when intestate was about to approach the track of the appellant, and appellant's servants saw, or, in the exercise of reasonable care, could have seen decedent and his horses and wagon and could have seen that intestate's horses were frightened and unmanageable and about to enter upon the track of appellant, or that they were upon the track, or so close thereto, that the car could not pass without striking them, and that intestate could not extricate himself from said dangerous position, nor from his wagon, and that he could not remove his horses from said track in time to avoid a collision; that appellant's motorman and servants in charge of said car saw or could have seen, in the exercise of ordinary care, intestate's peril in time to have avoided a collision, and stopped the car which they negligently and carelessly failed to do; that said car was equipped with air brakes and all modern appliances; that said servant of appellant did not have said car under control, but carelessly and negligently ran it without having it under control; "that in failing to see or take due notice of what they could have seen in the exercise of ordinary care, or seeing the dangerous condition and peril of said intestate, and failing to get said car under control, and failing to check or stop the same, said appellant carelessly, negligently and recklessly and in total disregard of intestate's peril, by its agents and servants aforesaid, ran its said car at a high and dangerous rate of speed against and upon this intestate and his horses and wagon; that at this time intestate was unable to get his horses and wagon from the track so as to avoid

a collision with said car which the motorman well knew, or could have known in the exercise of reasonable or ordinary care; that said car struck said intestate with great force and violence and caused his death immediately, all of which was due to the carelessness and negligence of said appellant and without any fault on the part of this intestate.”

The interrogatories answered by the jury set out in narrative form are in substance as follows: Appellee's intestate, Henry G. Reasoner, was killed by a car on appellant's traction line about 11 o'clock, August 8, 1908, at a highway crossing about one-third mile west of New Palestine, Indiana. Appellant's traction line at said crossing parallels the Cincinnati, Hamilton and Dayton Railway Company's track and runs forty-nine feet and six inches north of the side track. At said point appellant's traction line and said railroad tracks all run about east and west and the highway on which appellee's decedent, was killed, while traveling north thereon, at said point runs north and south. The decedent had lived about one-fourth mile north of said crossing for about seven years, had crossed it frequently, was acquainted with it and knew the location of said railroad tracks and traction line at said point. There was a large number of freight cars standing on said side track on each side of said highway extending from said highway east to a point about opposite the passenger station of said railroad. Decedent was driving two horses hitched to a wagon on which there was a hay-frame. Decedent had owned and used these horses for about seven years and had frequently driven them over said crossing and between said freight cars. At the time he was killed decedent was about thirty-two years of age, had good sight and hearing, and was then familiar with the location of said freight cars and acquainted with the running of cars on appellant's traction line at said crossing. He was killed by a west-bound car which had stopped at New Palestine to take on and discharge passengers, and said car approached said crossing on schedule time running about

25 miles an hour. The motorman in charge of said car blew the whistle for said crossing. The car weighed about 50 tons and was equipped with air and hand brakes which were in good order. The line of freight cars prevented the motorman from seeing decedent or his wagon and team until they had crossed said railroad track and had passed from between said freight cars. The team was less than 50 feet from the traction line when the motorman first saw it, and at that time one of the horses was going in a fast trot and the other in a gallop towards said crossing, and the motorman then immediately applied the brakes, reversed his car and did all in his power to stop it, and brought it to a stop about 100 feet west of the crossing. The motorman attempted to stop his car immediately upon observing the peril of decedent. The decedent was looking toward the west from the time he drove past the box cars on said side track up to just before the time that his horses reached appellant's tracks.

We have set out in narrative form the substance of all affirmative answers to the interrogatories. The negative answers find in substance that the decedent did not drive his horses across the railroad side track in a trot and that the evidence "*was insufficient*" for the jury to say that the traction car was about 150 feet east of the crossing when the motorman first saw the team of decedent on the highway or what distance the car was away from the crossing when the motorman first saw the team, but that he could have seen the team when he was 200 feet away.

Appellant insists that "this case, under the averments of the complaint, naturally divides itself into two propositions, the first of which is that the motorman in charge of appellant's car saw the intestate's peril in time to stop the car and avoid the collision, but negligently and carelessly failed to do so. The other is that the decedent was himself without fault." It is then argued that the answers to interrogatories expressly find that the motorman immediately upon seeing the team and discovering the peril of the decedent did all

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in his power to stop the car and prevent the injury to decedent, and that it must therefore follow that the general verdict cannot stand. Appellant makes its mistake in assuming that the only negligence charged against it is that its motorman saw the intestate's peril in time to have stopped the car and avoided the collision and that after seeing the peril of the decedent it negligently failed to do all it could to prevent the collision. This is not the only negligence involved in the charge. The complaint contains the additional charge that appellant's servants by the exercise of ordinary care could have seen, but negligently failed to see, appellee's peril in time to have prevented his injury. There is nothing in the answers to the interrogatories necessarily in conflict with such theory. While it may be true that these answers show that the motorman did all that he could do, to prevent the collision after he discovered the peril of the decedent there is no finding by the jury that necessitates the conclusion that the motorman, if he had had his car under proper control, by the exercise of proper care, might not have seen the peril of the decedent in time to have prevented the collision and the death that resulted. So far as is shown by the answers of the jury to the interrogatories, appellant's motorman may not have seen the decedent or his team until both the team and appellant's car were practically on the crossing, or so near thereto, that any effort then made to stop the car could not have prevented the collision. But the fact remains, as found by the jury, that such motorman could have seen such team when it was about 50 feet away from the crossing and when his car was 200 feet away. The jury evidently believed, as evidenced by its general verdict, that if the motorman had then seen and acted, that the collision would have been prevented. In the absence of contributory negligence on the part of the decedent in going upon the track, the finding that the motorman did all in his power after he actually saw the peril of decedent is not sufficient in view of the theory of the complaint above indicated. The

complaint does not proceed upon the last clear chance theory, but proceeds upon the theory that the decedent was without fault in entering upon the track and that appellant either saw the peril of the decedent in time to have prevented the collision by the exercise of ordinary care, or was guilty of original negligence in its failure to discover and see decedent's peril, when by the exercise of reasonable care it should have done so, and that such negligence was the proximate cause of the death of appellee's intestate.

It is next insisted that the answers to interrogatories show that appellee's intestate was guilty of negligence contributing to his injury. Under the averments of the com-

5. plaint, appellee may have proven that the horses of the decedent, before, and at the time, they entered upon appellant's track, were frightened and unmanageable, and not within the control of the decedent, and that their entry upon the appellant's track was not due to any lack of effort or want of care on the part of the decedent in trying to prevent such entry. The general verdict is a finding that such facts were proven, and we find nothing in the answers to interrogatories necessarily inconsistent with this finding. The "look and listen rule" applicable to the usual crossing cases has no application where the entry upon the track is due to circumstances and conditions such as those above indicated.

The averments of the complaint in this case and the findings of fact distinguish it from the cases of *Wabash R. Co.*

v. *Keister* (1904), 163 Ind. 609, 67 N. E. 521; *Kessler*

6. v. *Citizens' St. R. Co.* (1898), 20 Ind. App. 427, 50

N. E. 891; and *Cleveland, etc., R. Co. v. Moore* (1909), 45 Ind. App. 58, 90 N. E. 93, relied on by appellant. In fact the reasoning of the court in those cases supports our conclusions in this case. In *Wabash R. Co. v. Keister, supra*, the court said at page 615: "But if the deceased was placed in a perilous position, he was so placed by his own negligence; and even if, after discovering his perilous situation,

he exercised ordinary care under that set of circumstances, as his own negligence brought him into such a situation, no amount of care thereafter used, if his own negligence resulted in the injury, would entitle appellee to recover in this action.” Applying the same rule and reasoning to the person charged with negligently inflicting the injury, viz., to the appellant in this case, it necessarily follows that if appellee’s decedent, without his fault, was in a place of peril, the fatal consequences of which the motorman, on appellant’s car, by the exercise of ordinary care, could have seen and prevented, but which he was later unable to prevent because of his negligence in failing to observe and see in time, no amount of care exercised after he saw would excuse his lack of care in failing to see the peril in time to prevent the injury that followed. *Leavitt v. Terre Haute, etc., R. Co.* (1892), 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866; *Hilz v. Missouri, etc., R. Co.* (1890), 101 Mo. 36, 54, 13 S. W. 946. “The law requires of every person that he shall exercise due care to avoid injury to others and to protect himself, and the vigilance required is always commensurate with the danger to be apprehended. The rule rests equally on those who are liable to inflict injury and those who are liable to suffer. Appellee’s intestate was required to exercise the same vigilance to protect himself from injury that the appellant’s servants were to avoid injuring him, and a failure to exercise such vigilance upon the part of either one would constitute negligence.” *Lake Shore, etc., R. Co. v. Brown* (1908), 41 Ind. App. 435, 437, 84 N. E. 25.

It is also well settled that as a general rule in cases of this character both the plaintiff and defendant are each respectively charged not only with actual knowledge
7. but also with such knowledge as he may acquire by the exercise of ordinary care. The general verdict of the jury is a finding that appellant was guilty of the negligence charged in the complaint and that appellee’s decedent was without fault contributing thereto and we can-

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not say that on these questions of fact there is irreconcilable conflict between such verdict and the answers of the jury to the interrogatories.

Judgment affirmed.

NOTE.—Reported in 100 N. E. 116. See, also, under (1) 38 Cyc. 1927; (2) 38 Cyc. 1869; (3) 38 Cyc. 1929; (4) 33 Cyc. 1142; 38 Cyc. 1927; (5) 33 Cyc. 1014; (6) 33 Cyc. 961; (7) 33 Cyc. 922. As to a railroad company's duty to one near to track and in peril from moving train, see 20 Am. St. 114; 82 Am. St. 158. As to the care a railroad company must exercise at highway crossings, see 26 Am. Rep. 207. On the question of fright of team as excuse for omission to look and listen at railroad crossing, see 21 L. R. A. (N. S.) 415. For a discussion of a frightened or unmanageable team as an excuse for contributory negligence at a railroad crossing, see 16 Ann. Cas. 954.

LARCH ET AL. v. HOLZ.

[No. 7,827. Filed March 14, 1913.]

1. FRAUDULENT CONVEYANCES.—*Action by Administrator to Set Aside Conveyance of Decedent.—Complaint.—Necessary Allegations.*—In an action by an administrator, on behalf of the creditors of the estate, to set aside the fraudulent conveyance of the decedent, it is necessary to aver that at the time of the conveyance the decedent was insolvent and did not have enough property subject to execution to pay his then existing debts, and that he had no property subject to execution when the suit was brought. p. 59.
2. FRAUDULENT CONVEYANCES.—*Complaint.—Sufficiency.—Supplemental Complaint.*—A supplemental complaint relates back to the filing of the original complaint, so that where the original complaint in an action to set aside a fraudulent conveyance alleged that the defendant had no other property at the time of such conveyance, or at the time of the commencement of the action out of which plaintiff's debt could be made, a supplemental complaint filed after the defendant's death, and on the substitution of his administrator as a defendant, was not objectionable on the ground that it failed to aver what property the decedent owned at the time of his death, or that his administrator did not have on hand sufficient assets to pay decedent's debts. p. 59.
3. FRAUDULENT CONVEYANCES.—*Sufficiency of Evidence.—Fraud.*—In an action to set aside as fraudulent a mortgage executed by the debtor to his mother on his interest in real estate left by his

father, where it affirmatively appears from the evidence that the mortgage was executed to secure a *bona fide* indebtedness due to his mother, that the mortgage was agreed upon before it was known by either of them that the plaintiff had not filed his note as a claim against the estate of the debtor's father, who had been surety for the debtor on the note held by plaintiff, that at the time of executing the mortgage neither the debtor nor his mother knew that it would in any way affect the collection of plaintiff's note, and that the mortgage was taken by the mother for the purpose of preventing litigation and to make herself safe, there is no fraud shown to support a judgment for plaintiff. pp. 60, 63, 67.

4. **APPEAL.** — *Review.* — *Evidence.* — *Judgment.* — A judgment for plaintiff will not be disturbed on the evidence, if there is any evidence tending to support each material averment of the complaint. p. 63.
5. **FRAUDULENT CONVEYANCES.** — *Extent of Invalidity.* — A conveyance, made for the fraudulent purpose of cheating, hindering and delaying the creditors of the grantor, is void in its entirety. p. 65.
6. **FRAUDULENT CONVEYANCES.** — *Fraud.* — *Burden of Proof.* — Fraud is never presumed, but the burden of proving it is upon him who alleges it, so that the burden is upon one who claims that a conveyance was in fraud of creditors to show that fact. p. 65.
7. **FRAUDULENT CONVEYANCES.** — *Preferences.* — The fact that the giving and acceptance of a mortgage or other security, given to secure an honest debt and in good faith accepted for that purpose, operates to defeat the claims of other creditors, affords no grounds for complaint on the part of the latter. p. 65.
8. **FRAUDULENT CONVEYANCES.** — *Preferences.* — An insolvent debtor may lawfully prefer one or more of his creditors by payment, mortgage, pledge or deed, to the exclusion of the others, and the validity of such preference is not affected by the fact that the preferred creditor is a near relative of the debtor. p. 66.
9. **FRAUDULENT CONVEYANCES.** — *Preferences.* — *Right of Creditor to Procure Preference.* — In the absence of statutory prohibition, it is neither a legal nor moral wrong for a creditor, even with knowledge that other creditors will be deprived of obtaining payment of or security for their claims, to obtain payment of or security for his honest claim, and he is not bound to abate any degree of vigilance in doing so, in order to give some other creditor an equal chance. p. 66.
10. **FRAUDULENT CONVEYANCES.** — *Fraud.* — *Evidence.* — Knowledge on the part of a creditor of the existence of other debts at the time of accepting a mortgage to secure his claim, and that such other creditors had taken no steps to collect or secure their claims, and that the acceptance of such mortgage would render

the other debts impossible of collection, would not be evidence of fraud, if the debt for which the mortgage was given was *bona fide*.
p. 67.

11. **FRAUDULENT CONVEYANCES.—Evidence.—Sufficiency.**—Evidence is insufficient to sustain the setting aside of a mortgage on the ground that it is a fraud against creditors, where it is not shown that the mortgagor had no other property subject to execution.
p. 68.

From Warren Circuit Court; *J. T. Saunderson*, Judge.

Action by John Holz against Elizabeth Larch and another. From a judgment for plaintiff, the defendants appeal. *Reversed*.

Edwin F. McCabe, for appellants.

William B. Durborow, for appellee.

HOTTEL, J.—This is an action by appellee against appellants to set aside as fraudulent a mortgage executed by Walter H. Larch to appellant, Elizabeth Larch, who is the mother of Walter. Appellee filed with his complaint an affidavit and bond on which an order for writ of attachment was asked and obtained. During the pendency of the suit, Walter H. Larch died and Wilson Goodrich was appointed administrator of his estate and substituted as a defendant, whereupon a supplemental complaint was filed. A demurrer to the complaint was overruled and the cause put at issue by an answer in general denial. A trial of the cause by the court resulted in a finding and judgment for appellee setting aside the mortgage and for appellants on the attachment proceeding. A motion for new trial made by appellants was overruled and an appeal prayed. The errors assigned in this court and relied on for reversal call in question the sufficiency of the complaint to withstand a demurrer and the ruling on the motion for a new trial.

The complaint contains the usual averments of a complaint of its character and the only objection urged against it is, that the supplemental complaint fails to aver what property Walter H. Larch owned at his death or that the administrator did not have in his hands assets sufficient to pay the

debts of said Walter. In support of this contention appellants rely on the cases of *Cox v. Hunter* (1881), 79 Ind. 590, 596; and *Jarrell v. Brubaker* (1898), 150 Ind. 260, 270, 49 N. E. 1050. The case at bar is easily distinguished from those cases. In those cases the administrator himself sought to set aside as fraudulent, conveyances made by his deceased grantor in his lifetime and subject the real estate so conveyed to sale for the payment of the debts of such grantor. In such a case it was necessary, under the well-established rules of law, that the administrator before he could set aside such conveyances, should allege and prove that the decedent had no other property or assets out of which his debts might be paid in order to show the necessity of resorting to such real estate for such purpose. §§2848-2850 Burns 1908, §§2332-

2334 R. S. 1881. Independent of the foregoing sec-

1. tions of statute, the action in each of the cases relied on by appellant, being by the administrator for and on behalf of the creditors of the fraudulent grantor, it would be necessary for such administrator to aver such facts as the creditors would themselves be required to aver, and this would require him to aver and prove that when the conveyance alleged to be fraudulent was made "the debtor was insolvent and did not have enough property subject to execution to pay his then existing debts, and that he had no property subject to execution when the suit was brought."

Cox v. Hunter, supra, 595, 596; *Cannon v. Castleman* (1905), 164 Ind. 343, 348, 73 N. E. 689, and authorities cited.

2. The supplemental complaint in this case, relates back to the filing of the original complaint and averments in such supplemental and original complaint to the effect that Walter Larch had no other property at the time of such conveyance, or, at the time of the commencement of the action, out of which the debt could be made, fully complied with the demands of the law indicated by the foregoing decisions. The complaint was sufficient as against the objection urged.

In the discussion of the alleged error of the court in 3. overruling appellants' motion for a new trial it is very earnestly insisted that the decision of the court is not sustained by sufficient evidence. The facts disclosed by the evidence about which there seems to be no dispute are in substance as follows: On February 23, 1906, Walter Larch borrowed of appellee \$2,000 for which he gave his note with his father, Aaron Larch, as surety. Aaron Larch died testate, October 3, 1906, (We quote from appellee's brief.) "and left all of his property real and personal to his wife, Elizabeth Larch, the appellant, during her life, with power of disposing of the personalty but the remainder in fee of personalty and real estate, in certain specified parts, to his four children, Walter being one of them. To Walter was left forty-five acres in Warren County and a house and lot in Ambia, Benton County, subject to his mother's life estate, also a certain legacy in money if so much was on hand at the death of the widow, Elizabeth. Walter Larch and his mother, Elizabeth Larch, were appointed executor and executrix. While the estate was pending in court, Walter Larch paid Holz the interest as it accrued on the note * * *. The final account in the Aaron Larch estate was made and sworn to, January 5, 1909, and on the same day * * *. Walter Larch executed to his mother a mortgage on all the real estate devised him in his father's will, excepting some six acres which was omitted from the mortgage by the mistake of the scrivener, to secure a note purporting to have been executed by Walter to his mother, December 2, 1908, for \$3600 which was afterwards reduced to \$3440. Walter Larch had bought and moved on a farm in Michigan some thirteen months prior and was living there with his wife when this action was brought * * *. Walter owed his father at the time of the father's death, a note for \$180. After Walter was appointed executor he, as executor, drew from the bank at Ambia, \$1,100 of the estate fund * * * and gave his mother his personal note for the money. Walter owed John

Gay a \$2,000 note on which his brother, Perry, and another were security. At the solicitation and persuasion of Perry, his mother, Elizabeth, paid off this \$2,000 Gay note. * * * About a month afterwards, Mrs. Larch went to Michigan and brought Walter back with her to Indiana, that there had been difficulty in getting Walter to come back to make settlement. At Mr. Sutton's office in Williamsport on January 5, 1909, * * * Walter executed to his mother the mortgage purporting to cover all the real estate devised him in his father's will to secure this note that was dated December 2, 1908.' It is insisted by appellee that these facts in effect show, that Walter stripped himself of all his property, and with the knowledge of his mother prevented Holz from realizing on his note; that Elizabeth Larch by interfering in the payment of the Gay note in the manner stated, instead of leaving Gay and Holz an equal opportunity to make their respective debts off of Walter, practiced a fraud on appellee which was knowingly contributed to and participated in by Walter.

In addition to the facts before quoted from appellee's brief, the undisputed evidence discloses further facts as follows: the will of Aaron Larch, deceased, was probated December 17, 1906, and said Walter and Elizabeth qualified as executor and executrix and on the next day, to wit: December 18, filed an inventory showing personal property appraised at \$2,399.20. There was cash in the bank and notes belonging to said estate aggregating several thousand dollars, which for some reason were not placed on the inventory. The deceased, Aaron Larch, left ample property, both real and personal to pay all his debts, including said note on which appellee was surety for said Walter. The final report made and sworn to by Elizabeth Larch and her son Walter on January 5, was filed with the clerk of the court January 6, 1909, and was set for hearing on February 8, 1909. Notice of such hearing was issued on January 6, 1909. Appellee neglected to file his said note as a claim against said estate.

Appellee is forced to rely chiefly, if not exclusively, on the evidence of Elizabeth Larch to show that the mortgage in question was given to her by her son for the fraudulent purpose of cheating, hindering and delaying him in the collection of his debt. Mrs. Larch expressly and positively denied any such intent, and testified that, at the time she paid the Gay note and had her settlement with her son Walter in which he gave her the \$3,600 note and agreed to secure the same by the mortgage on his real estate, she then did not know that appellee had not filed his note against the estate of her husband, and that all she was trying to do was to get Walter to settle up, prevent litigation and make her safe. She further testified, in effect, that she did not learn that appellee had not filed his claim until January 5, 1909, when she was told by her attorney who prepared her said final report, settling her husband's estate; that at the time she took her mortgage from Walter he still owned his farm in Michigan and she thought he could and would pay appellee's note. Some apparent contradictions appear in this old lady's evidence, on the subject of dates and persons present on the different occasions mentioned in her testimony, but a careful examination of the evidence convinces us that such apparent contradiction is, in a large measure, if not altogether, explained by a confusion of occurrences both in the questions of the interrogator and the answers of the witness. It appears from the evidence that the Gay note was paid at the bank of Ambia by Mrs. Larch on one occasion and that a month later, viz., January 2, 1909, she met her sons Walter and Perry at the same bank and there had her settlement with Walter in which the Gay note was again considered and settled with him. Both of these transactions at the bank seem to have been referred to, both by the questioner and the witness, as the occasion when the Gay note was settled, and as a consequence confusion and apparent contradiction resulted as to dates and the persons present on these respective occasions. It is insisted by appellee, in

effect, that these apparent contradictions may have caused the trial court to discredit the statements made by Mrs. Larch in her own favor, and furnished such court the ground and reason upon which it based its decision that the transaction in question was fraudulent. Granting that such confusion and apparent contradictions were of a character to warrant the trial court in disregarding the statements of Mrs. Larch, favorable to herself, yet, the burden was on appellee to show that the transaction was tainted with fraud, and this was a fact to be proven, and, in the absence of such proof, could not be presumed.

We recognize that, under the well-established rules

4. of this court, if there be any evidence tending to support each material averment of the complaint, the judgment of the trial court must be affirmed. But appellee has been unable in his brief to point out any evidence
3. even tending to show fraud unless the apparent contradictions mentioned, can be so treated, or unless the additional fact that the evidence does not satisfactorily show that Walter Larch was present when his mother paid the Gay note, and that from all that appears, this payment, when it was made, may have been voluntary on her part and without the knowledge or consent of her son, can be said to be evidence of such fraud. On this last proposition the evidence shows that Mr. Hunter, the attorney for Gay, was present both on the occasion of the payment of the Gay note by Mrs. Larch, and on the occasion of her settlement with her son. A memorandum made by Mr. Hunter of the various items that made up the payment of the Gay note shows that the interest on each of the notes was calculated to December 2, 1908, and in connection with the other evidence furnishes conclusive proof that the payment of such note by Mrs. Larch was made on said date. It is substantially admitted by appellee that Mrs. Larch, before she paid the note, had been trying to get Walter to come back and make a settlement of all his matters. Mr. Gay had placed his note in the hands

of his attorney, Mr. Morgan, who was insisting on its payment. Walter's brother, Perry, who was one of the sureties on this note, had become interested and was using his influence to get his mother to get Walter to settle the note. Mrs. Larch, about this time, sent Mr. Morgan to Michigan to see Walter and get a settlement of the note. When Mr. Morgan returned, he brought with him a check given by a Mr. Crawford, for Walter, to be applied on said note and pursuant to some understanding and arrangement had between Walter and said Morgan, not disclosed by the evidence, Mrs. Larch then paid the balance of this note, after subtracting the amount of said Crawford check. A few days later Mrs. Larch went to Michigan and brought Walter back with her on January 1, 1909. On January 2, they went to the bank at Ambia and there had their settlement and Mr. Morgan made a memorandum of the different items that entered into the settlement of the Gay note. These items were made up of notes given to Aaron Larch, and held by his widow, Mrs. Larch, and by her assigned to Mr. Gay, a check given by Mrs. Larch on the funds in bank, and some cash. This memorandum also showed an item of expense and charges paid to Mr. Morgan on his trip to Michigan. The evidence of Mrs. Larch relative to the items which went to make up the \$3,600 for which Walter gave his note, is fully and completely corroborated by other witnesses and by the memorandum, check and notes connected therewith. Mrs. Larch explained the taking of the new note for \$3,440, instead of the \$3,600 as originally agreed upon and shown by the settlement by saying that, on the day when her husband's estate was finally settled and the mortgage in question given, her son had a claim for expenses and services as executor of said estate which was allowed in the sum of \$160 and subtracted from the amount of his indebtedness evidenced by the note before given and that a new note for \$3,440 was written and dated December 2, 1908.

It is admitted by appellee that Walter Larch owed his

mother the \$180 note and the \$1,100 note before mentioned herein, with accumulated interest, and that to this extent a consideration is proven for the note which the mortgage in question was given to secure. Nor is it denied by appellee that the undisputed evidence shows that Mrs. Larch paid the Gay note, but, as before indicated, it is insisted that such payment was voluntary and without the son's direction or knowledge and that this indicated a fraudulent intent on the part of Mrs. Larch to cheat, hinder and delay appellee in the collection of his note; that where a consideration is partly fraudulent it will taint the transaction in its entirety.

To the extent that a conveyance conceded to be made

5. for the fraudulent purpose of cheating, hindering and delaying the creditors of the grantor becomes tainted and vitiated by such fraud in its entirety and should be held void in its entirety, appellee's contention is supported by authority. *Reagan v. First Nat. Bank, etc.* (1902), 157 Ind. 623, 657, 61 N. E. 575, 62 N. E. 701. But such contention assumes the existence of the fact in controversy.

As affecting appellee's contention we submit that the following well-settled propositions of law are important if not controlling: (1) the burden of showing fraud was

6. upon appellee, and is never presumed, but on the contrary the presumption is in favor of honesty and good faith until the contrary appears. This presumption applies in cases of this character. *Phelps v. Smith* (1888), 116 Ind. 387, 391, 17 N. E. 602, 19 N. E. 156. (2) "Where a

7. mortgage or other security is given to secure an honest debt, and is in a *bona fide* manner accepted for that purpose, the fact that the giving and accepting of such security may result in defeating the claims of other creditors, affords no legal or equitable grounds for complaint upon the part of the latter." *Levering v. Bimel* (1897), 146 Ind. 545, 552, 45 N. E. 775. This doctrine is settled in this State by many decisions, of which the following are a part. *Lord*

v. *Fisher* (1862), 19 Ind. 7; *Wilcoxon v. Annesley* (1864), 23 Ind. 285; *Ball v. Barnett* (1872), 39 Ind. 53; *Cushman v. Gephart* (1884), 97 Ind. 46; *Grubbs v. Morris* (1885), 103 Ind. 166, 2 N. E. 579; *Gilbert v. McCorkle* (1887), 110 Ind. 215, 219, 220, 11 N. E. 296; *Hays v. Hostetter* (1890), 125 Ind. 60, 25 N. E. 124; *Straight v. Roberts* (1890), 126 Ind. 383, 26 N. E. 73; *Dice v. Irvin* (1887), 110 Ind. 561, 565, 566, 11 N. E. 488; *Fuller & Fuller Co. v. Mehl* (1893), 134 Ind. 60, 33 N. E. 773; *Simmons Hardware Co. v. Thomas* (1897), 147 Ind. 313, 318, 46 N. E. 645; *Owens v. Gascho* (1900), 154 Ind. 225, 228, 56 N. E. 224; *Nappanee Canning Co. v. Reid, Murdock & Co.* (1903), 159 Ind. 614, 619, 64 N. E. 870, 64 N. E. 1115, 59 L. R. A. 199; *State Bank v. Backus* (1903), 160 Ind. 682, 697, 67 N. E. 512; *City Nat. Bank v. Goshen Woolen Mills Co.* (1904), 163 Ind. 214, 71

N. E. 652. (3) "In this State it is settled by a long

8. course of decisions that an embarrassed or insolvent debtor may lawfully prefer one or more of his creditors, by payment, mortgage, pledge or deed to the exclusion of the others. No statute forbids such preferences; no rule of law is understood to prevent them. * * * The fact that the person whose debt is so preferred is a wife or other near relative does not affect the validity of such preference." *Nappanee Canning Co. v. Reid, Murdock & Co., supra*, 619.

(4) "In the absence of statutory prohibition, it is

9. neither a legal nor a moral wrong for a creditor to obtain payment of, or security for, an honest claim, even though he knows that others, equally deserving, will be thereby deprived of obtaining payment or security for their claims." *Gilbert v. McCorkle, supra*, 220. See, also, *Winslow v. Wallace* (1888), 116 Ind. 317, 327, 17 N. E. 923, 1 L. R. A. 179; *Harshman v. Armstrong* (1889), 119 Ind. 224, 225, 21 N. E. 662; *Clow v. Brown* (1906), 37 Ind. App. 172, 181, 72 N. E. 534. *Heiny v. Lontz* (1897), 147 Ind. 417, 422, 46 N. E. 665. (5) "One creditor, whose claim is honest, is not bound to abate any degree of vigilance in obtaining

security from his debtor, in order to give some other creditor an equal or superior chance to secure his claim." *Walling v. Lewis* (1889), 119 Ind. 496, 498, 21 N. E. 1108. See, also, *Carnahan v. Schwab* (1891), 127 Ind. 507, 510, 26 N. E. 67; *John Shillito Co. v. McConnell* (1891), 130 Ind. 41, 42, 26 N. E. 832; *Fuller & Fuller Co. v. Mehl, supra*; *Peed v. Elliott* (1893), 134 Ind. 536, 539, 34 N. E. 319; *First Nat. Bank, etc., v. Dovetail Body, etc., Co.* (1896), 143 Ind. 550, 556, 41 N. E. 370, 52 Am. St. 435; *Levering v. Bimel, supra*; *Owens v. Gascho, supra*; *State Bank v. Backus, supra*. (6)

If it should be assumed that appellant, Elizabeth

10. Larch, knew of the existence of appellee's note, and

that she knew, when she first arranged with her son that he should give her the mortgage in question, that appellee had not filed his claim against her husband's estate (and this she says she did not know) and that she knew that by taking her mortgage she would thereby render appellee unable to collect his debt (this she also says she did not know); such knowledge alone would not be evidence of fraud if the debt which the mortgage was given to secure was *bona fide*. *First Nat. Bank, etc., v. Farmers, etc., Bank* (1908), 171 Ind. 323, 344, 86 N. E. 417. *Dice v. Irvin, supra*.

It affirmatively appears from the evidence in this case that the mortgage in question was given to Elizabeth Larch to

secure a *bona fide* indebtedness, and that such mort-

3. gage was agreed upon by said Elizabeth and her son

before it was known by either of them that the appellee had not filed his note as a claim against the estate of Aaron Larch and at a time when the mortgagor and mortgagee did not know that such mortgage would in any way affect the collection of appellee's note; that the purpose of appellant, Elizabeth Larch, in securing such mortgage was to prevent litigation and make herself safe and with no intent to cheat, hinder or delay appellee in the collection of his debt. The evidence shows appellee's failure to collect his note, is due to his own neglect to file it against the estate

of Aaron Larch rather than to any fraud of the appellants. To allow appellee, under this evidence, to retain the preference in the collection of his note which the judgment of the trial court gives him, is to give him the same preference which such court by its judgment found to be fraudulent when secured by the vigilance and diligence of appellant, and would be contrary to the law as expressed in all of the authorities above cited. See, also, *Davis v. Schwartz* (1894), 155 U. S. 631, 640, 15 Sup. Ct. 237, 39 L. Ed. 289.

We have thus discussed at length the sufficiency of the evidence upon the question of fraud because it is the important question in the case and the one on which any future trial will probably have to be determined. Whatever might

be our notion of the sufficiency of the evidence upon

11. this question, the present decision must be reversed on account of the insufficiency of the evidence on other material averments of the complaint. There is no evidence in the record showing that appellee had no other property subject to execution, either at the time of the execution of the mortgage in question, or at the time of the filing of suit herein. The authorities before cited herein indicate the necessity of such proof.

Judgment reversed with instructions to the court below to grant a new trial and for further proceedings consistent with this opinion.

NOTE.—Reported in 101 N. E. 127. See, also, under (1) 20 Cyc. 731, 732; (2) 20 Cyc. 743; (3) 20 Cyc. 784, 792; (4) 3 Cyc. 360; (5) 20 Cyc. 409; (6) 20 Cyc. 751; (7) 20 Cyc. 581; (8) 20 Cyc. 572, 597; (9) 20 Cyc. 472; (10) 20 Cyc. 590; (11) 20 Cyc. 794. As to the essential averments of pleadings attacking a conveyance as fraudulent, see 20 Am. Dec. 315. As to the intent of grantor as test of validity in respect of transfer alleged to be fraudulent, see 14 Am. St. 747. As to where the burden lies of proving fraud, see 11 Am. St. 758.

THE VALENTINE COMPANY v. SLOAN.

[No. 7,848. Filed March 14, 1913.]

1. **PLEADING.—Complaint.—Sufficiency.—Initial Attack on Appeal.**
—A complaint in an action for personal injuries charging that defendant negligently maintained steps in the aisle of its opera house in an irregular and uneven condition, without providing lights of sufficient power to disclose such condition, and that such negligence was the proximate cause of plaintiff's injuries, stated facts sufficient to bar another action for the same cause, and was sufficient as against attack made for the first time on appeal. p. 71.
2. **THEATRES AND SHOWS.—Injury to Persons.—Assumption of Risk.**
—The doctrine of assumption of risk does not apply in the case of a person injured by reason of the unevenness of the steps in an aisle of an opera house, where it appears in evidence without contradiction that plaintiff had never been in the building before and had no knowledge of the condition of the steps, and the jury found that she was unable to see their condition. p. 72.
3. **THEATRES AND SHOWS.—Care Required of Proprietor.**—One who conducts a theatre for reward or profit to which the general public are invited, must use ordinary and reasonable care to make the premises as reasonably safe as is consistent with the practical operation of the same. p. 72.
4. **EVIDENCE.—Expert Evidence.—Lighting of Theatre.**—In an action for injuries to plaintiff caused by defective steps in the aisle of a theatre building, where the theory of the defense was that it had provided sufficient lamps to light the theatre, it was proper to ask an expert witness for plaintiff on direct examination as to whether there was a better way to locate the light for the purpose of distributing it in and around the steps. p. 73.
5. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—Where, in an action for injuries caused by defective steps in a theatre building, the jury specially found that it was dark in the aisle so that one could not see the steps, and that defendant negligently failed to furnish light of sufficient power to disclose the condition of the steps, and that all the lamps provided were not lighted, error, if any, in admitting expert testimony as to whether there was a better way to locate the lights in the building, was harmless. p. 73.

From Circuit Court of Marion County (17,542); *Charles Remster*, Judge.

Valentine Co. v. Sloan—53 Ind. App. 69.

Action by Mary F. Sloan against The Valentine Company.
From a judgment for plaintiff, the defendant appeals.
Affirmed.

W. H. H. Miller, C. C. Shirley, Samuel D. Miller and W. H. Thompson, for appellant.

John H. Kingsbury, for appellee.

IBACH, C. J.—Appellee brought this action and recovered judgment for \$1,500 damages for personal injuries occasioned by appellant's negligence in maintaining steps in a dangerous condition in the gallery of English's Opera House at Indianapolis. It is assigned as error and argued, (1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in overruling appellant's motion for new trial, upon the grounds that the court erred in giving certain instructions to the jury, and in admitting certain evidence.

The charging portion of the complaint is in the following words: "The plaintiff, Mary F. Sloan, complains of defendant, The Valentine Company, a corporation, and for cause of action avers that defendant maintains a public theatre, viz., English Opera House, wherein it presents for reward, public entertainments. That in said opera house certain aisles have been constructed and maintained on an elevation in excess of 45 degrees, with steps therein of uneven and irregular width, to wit, of the dimensions approximately of the tread at twelve and sixteen inches respectively. That for want of uniformity in tread of said steps they are deceptive and dangerous for one to descend if not familiar with said conditions. That on evening of February 8, 1908, defendant conducted a public entertainment in said theatre, and that during and prior to said performance, said defendant with notice and knowledge of uneven and irregular tread of said steps, did negligently and carelessly fail, neglect, and omit to furnish and provide light of sufficient candle power so as to efficiently disclose and expose said uneven and irregu-

lar condition of said steps. That on evening of said February 8, 1908, at the invitation of defendant, plaintiff visited said theatre and attended an entertainment given by defendant therein; that she paid and caused to be paid to defendant the reward charged by it therefor. That at invitation and direction of defendant, plaintiff entered said theatre shortly before commencement of said entertainment, and while attempting to descend an aisle therein with said elevation in excess of 45 degrees and with said irregular and uneven steps constructed with tread at twelve and sixteen inches respectively as aforesaid, and negligently maintained by defendant without sufficient candle power light to expose and disclose said condition; that while plaintiff was so attempting to descend said aisle, she was deceived by the irregular and uneven condition of said steps, and was tripped thereby, and thrown with great violence whereby her head was injured and her forearm broken. And plaintiff charges that she did not know of uneven and irregular condition of said steps, and did not see, and could not see the condition of said steps because of negligent failure of defendant to furnish sufficient light to expose and disclose the condition of said steps." That by reason of said injury plaintiff has contracted certain described injuries, for which she asks damages.

It appears from the averments of the complaint

1. that appellant was negligent in maintaining steps in the aisle of its opera house in an irregular and uneven condition, without providing lights of sufficient power to disclose such condition, and that such negligence proximately caused appellee's injury. The complaint states facts sufficient to bar another cause of action, and since appellant did not demur to it, this is all that is necessary. *Cleveland, etc., R. Co. v. Beard* (1913), 52 Ind. App. 105, 100 N. E. 392, and cases cited.

By instruction No. 5 the jury was told that plaintiff to recover must establish that she was injured, as alleged in

the complaint, that the defendant was negligent as alleged in the complaint, and such negligence was the proximate cause of the injury, and that she was damaged by reason of such injury. By instruction No. 6 it was told that if she failed to establish any one of these propositions, she could not recover, but if she established each of them, she should recover, unless the jury should find her guilty of negligence proximately contributing to her injury, in which latter case she could not recover. It is urged that instruction No. 6 was mandatory, and was prejudicial to defendant, in that it

omitted the element of assumption of risk. We are

2. of the opinion that the doctrine of assumption of risk has no application to the case made by appellee's complaint, nor to the evidence introduced in the cause. *Indianapolis Abattoir Co. v. Temperly* (1903), 159 Ind. 651, 64 N. E. 906, 95 Am. St. 330; *Cumberland Tel., etc., Co. v. Hatter* (1909), 44 Ind. App. 625, 89 N. E. 912. This doctrine could not apply to this case under the holding in *Indianapolis, etc., R. Co. v. O'Brien* (1903), 160 Ind. 266, 65 N. E. 918, 66 N. E. 742, relied upon by appellant, for it appears in evidence without contradiction that appellee had never been in the opera house before, and had no knowledge or notice of the condition of the steps, and the jury found that she was unable to see their condition. The instructions therefore are not open to the objections urged by appellant.

It is next urged that the court erred in permitting the witness Bedell on direct examination as plaintiff's witness in chief to answer the question as to whether there was a better way to locate the light for the purpose of distributing it in

and around the steps in the north center aisle. One

3. who conducts a theatre for reward or profit to which the general public are invited to attend performances, must use ordinary and reasonable care to make the premises as reasonably safe as is consistent with the practical operation of the same. Appellant's theory of defense in this cause was that it had provided a sufficient number of lamps

to light the theatre. Appellee introduced evidence

4. to show that the aisle was dark, and to show where the lamps provided were located. Appellee's counsel then asked the above question of the witness Bedell as an expert on lighting and architecture, to show that it was possible to make the aisle light, stating to the court as a justification for the question, that if the aisle was so dark as to be dangerous, and it could have been made light, then it was negligence to fail to make it light. We think this question was proper. However, the jury found in answers to interrogatories that it was dark in the aisle, and that a

5. person could not see the steps, also that appellant negligently failed and omitted to furnish light of sufficient candle power to light up the gallery, or disclose the condition of the steps, and because of such omission or failure plaintiff was unable to see their condition, also, that all the lamps which were provided were not lighted, and that the unevenness in the tread of the steps made them unsafe to one exercising ordinary care. If the appellant was negligent in failing to furnish light of sufficient candle power, that is, in the amount of light which it furnished, it is immaterial where the lights provided were located, and if the lamps were not lighted, certainly it could make no difference where they were located. It thus appears from the answers to interrogatories that the evidence objected to did not influence the verdict, therefore, it could not harm appellant, even if it had been improperly admitted.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 102. See, also, under (1) 31 Cyc. 771; (2) 38 Cyc. 268; (5) 38 Cyc. 1435. As to what duties theatre managers and proprietors owe their patrons, see 110 Am. St. 532. As to opinion testimony in respect of the probable effect had persons acted otherwise than as they did, see 71 Am. Dec. 538. As to expert witnesses and what they may testify to, see 66 Am. Dec. 228. On the question of the liability of one maintaining place of amusement to which the public are invited, for safety of patrons, see 3 L. R. A. (N. S.) 1132; 19 L. R. A. (N. S.) 772; 32 L. R. A. (N. S.) 713; 42 L. R. A. (N. S.) 1070; 5 Ann. Cas. 926; 15 Ann. Cas. 517.

JUDY v. JESTER ET AL.

[No. 7,775. Filed December 11, 1912. Rehearing denied March 14, 1913.]

1. **APPEAL.—Questions Presented.—Sufficiency of Complaint.—Findings and Conclusions of Law.**—The exceptions to the conclusions of law present the same questions as the overruling of the demurrer to the complaint, where the facts have been fully and correctly found within the issues. p. 84.
2. **HUSBAND AND WIFE.—Conveyances.—Release of Wife's Inchoate Interest.—Presumptions.**—A wife's release of her inchoate interest in her husband's land may be a valuable consideration for a promise to her; and it will be presumed, in the absence of any agreement to the contrary, that the inducement for her releasing such inchoate right by joining the husband in a conveyance of his land, as to the grantee, was the consideration paid by the latter for the land conveyed. p. 84.
3. **HUSBAND AND WIFE.—Wife's Inchoate Interest in Husband's Lands.—Nature of Interest.**—The wife's interest in her husband's real estate is an estate in the land itself, and not a mere encumbrance resting upon it. p. 85.
4. **PLEADING.—Complaint.—Sufficiency.—Parties.**—Notwithstanding the liberal construction given to §263 Burns 1906, §262 R. S. 1881, providing that all persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs, the complaint must state a cause of action in favor of all the plaintiffs and must show that they have a common grievance and are each interested in the relief asked, or in some part of it, although their interests in the judgment need not be the same or equal. p. 85.
5. **FRAUD.—Conveyance Obtained by Fraud.—Action for Damages.—Complaint.—Parties.—Husband and Wife.**—A complaint alleging facts showing that a husband was defrauded out of land, the title to which was in his name, and in the conveyance of which his wife joined, shows such an interest in the wife as makes her a proper party plaintiff with her husband in a suit to recover damages for such alleged fraud. p. 85.
6. **FRAUD.—Representations of Value.**—Although representations as to value are not ordinarily sufficient to support a charge of fraud, where the vendor of real estate assumes to have special knowledge of the value of the property, and knows that the vendee is ignorant of the value and inexperienced, and that he is trusting entirely to the good faith and judgment of the vendor, the vendor's representations of value, made under such circumstances

as the basis for a contract between the parties, may be regarded as representations of material facts. p. 86.

7. **FRAUD.—*Fraudulent Representations.—Complaint.—Sufficiency.—Findings.***—In an action for damages for fraud perpetrated in an exchange of real estate, where the allegations of the complaint, and the findings of fact in support thereof, showed that defendant stated that his land was first class agricultural land, composed of black loam with a clay subsoil and was suitable for the raising of all kinds of grain, that the whole farm was as good as the small portion pointed out to plaintiff, that the soil was as deep and as good and of the same quality as that of a farm previously examined by plaintiff, and as good in every particular, and that the farm had deep and productive soil over all its surface except about three acres, and that the statements were knowingly and falsely made for the purpose of defrauding plaintiff, fraud was sufficiently shown. p. 87.
8. **FRAUD.—*Reliance on Fraudulent Representations.***—While one may not rely upon the truth of a statement which he knows to be untrue, or which is manifestly false, he may rely on the express statement of an existing fact, the truth of which is unknown to him, but which is asserted by the other party as a basis for mutual agreement. p. 87.
9. **FRAUD.—*Reliance on Fraudulent Representations.—Negligence of Party Defrauded.***—Where it was shown that plaintiff was taken into a section of country in which he was unacquainted, that his credulity, ignorance of values and inexperience were known to defendant, that after looking at one farm with a view of trading for it defendant took him to another which he only casually observed with no idea or intention of purchasing, that on the way back to the station defendant made representations as to the latter farm and of helpful advice given to other persons in similar transactions, and thus induced the plaintiff to suggest a trade for the latter farm, that they were travelling in the night, and that early the next morning plaintiff was at home sixty miles away, but that he was still under the influence and domination of defendant, and without convenient means to learn the facts for himself, it cannot be said as a matter of law that he was so negligent as to bar his right to recover for the fraud practiced on him. p. 88.
10. **FRAUD.—*Fraudulent Representations.—Liability.***—Defendant in an action for damages for fraud practiced on plaintiff in the exchange of real estate, cannot escape liability, where he assumed to know the facts and made false statements of material matters to induce plaintiff to make the trade, knowing that the statements were false and that plaintiff was relying upon their truthfulness, and by his management, connivance, trickery and

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influence, induced plaintiff to rely on same and from investigating to ascertain the facts. p. 88. *Presumptions.—Failure to Produce Evidence.*—A party to an action has at his command testimony pre-ferable to himself, his failure to produce the same creates a presumption that such testimony if produced would be to his disadvantage. p. 89.

in Circuit Court; *Joseph Combs*, Judge.

William P. Jester and another against *John F. Judy*. From a judgment for plaintiffs, the same in F. Judy, appeals. *Affirmed.*

Billings, Wilson & Quinn and *Sheridan & McAdams*, appellants.

Ed and Thompson & McAdams, for appellees.

This is an action for damages, brought by appellants and one Isaac Alonzo Barkhurst in the exchange of certain real estate. The complaint contains two paragraphs. A separate demurrer was filed to each paragraph and overruled. Issued by a general denial. Upon motion the case was removed from the Tippecanoe Superior Court to the Circuit Court where the case was tried by the court. A special finding of facts was duly made and conclusions of law stated thereon in favor of appellees for which Elizabeth Jester had an inchoate interest in Tippecanoe County real estate; also that the law was in favor of Barkhurst and that he have judgment against appellants with costs. A motion for new trial was overruled and judgment rendered against appellants in favor of appellees and this appeal was prayed and granted. The grounds relied upon for reversal are: (1) The overruling of demurrers to each paragraph of the complaint; (2) the sufficiency of the cause of action against appellants; (3) error in the conclusions of law; (4) the overruling of the motion for new trial. The complaint is ex-

tremely long, and in substance charges in each paragraph, that appellees were husband and wife; that on November 9, 1906, and prior thereto William P. Jester was the owner in fee simple of 117 acres of real estate in Tippecanoe County, Indiana, of the value of \$100 per acre, on which there was a mortgage for \$5,860; that at said time appellant, owned a large amount of land in Starke County, Indiana; that appellant for the purpose of cheating and defrauding said appellee out of said land in Tippecanoe County, pretended and represented to him, that said lands in Starke County were all first class agricultural lands, composed of black loam, with a clay subsoil, and suited to the raising of all kinds of grain; that in furtherance of his said scheme to cheat and defraud said Jester out of his land, appellant induced him to go to Starke County with him and when there took him upon a portion of his land which appeared to said Jester to be the kind of land represented to him by appellant; that before leaving said lands appellant expressed a desire to go to another tract, which he claimed to own, for the purpose of seeing some tenants living thereon, and invited Jester to go along, which he did; that while upon said last-mentioned tract of land appellant in furtherance of his scheme to cheat and defraud appellee out of his said lands called his attention to a small portion of the land in their immediate presence and said to him that said lands were the most fertile in all northern Indiana, and the entire tract of 210 acres, was similar to and as good as the land in their immediate presence, and was worth \$75 per acre; that after leaving said lands and on their way back to the town of North Judson, Indiana, appellant proposed to trade his said 210 acres of land for the land of Jester in Tippecanoe County; that this was the first information of the desire or intention of appellant to trade said lands that appellee received; that in conversation with reference to said trade, appellant repeatedly represented said 210 acres to be first class land, fit in every particular for raising all kinds of grain; that all of it was as

good as that upon which they were at the time Jester's attention was called to the soil; that appellant in furtherance of his scheme to cheat and defraud appellee proposed to sell him said 210 acres of real estate upon the following terms: appellee to assume and pay a mortgage thereon of \$4,400 and to execute to appellant a purchase money mortgage upon said land for \$5,129.75, due ten years after date, interest payable annually at six per cent; appellee, Jester, his wife joining him therein, to sell and convey, by warranty deed, to appellant his said lands in Tippecanoe County, subject to the mortgage thereon for \$5,868. As a further consideration said Jester was to sell and deliver to appellant all his personal property at the time, upon his land in Tippecanoe County, except the corn, of the value of \$1,000; that appellee believed said representations to be true and relied upon the same, and being deceived thereby, entered into a written contract, on November 9, 1906, with appellant upon the terms aforesaid; that the trade was thereafter carried out and warranty deeds executed as agreed by the parties, which appellees were induced to execute by the fraud of appellant aforesaid; that between the date of said contract and the execution of the deeds, appellee had no opportunity to examine said lands which were situate about 70 miles from his home; that he relied upon and believed said representations made by appellant to be true with reference to the character and value of said land; that in truth and in fact at the time said contract was made and the deeds executed, said Starke County lands were not worth over \$10 per acre; that the soil was not fit and suitable for agricultural purposes as represented by appellant and was not over the entire tract as shown to appellee at the place and time they visited the farm, and there was not over two or three acres of such soil; that the remainder of the 210 acres was practically worthless for agricultural purposes, was composed of quicksand, there was no clay subsoil and no black loam on top as represented by appellant; that appellee Jester was not aware of said fraud

practiced upon him until some weeks after the trade had been consummated, and not until he went to the place in the winter of 1906 with a gentleman who desired to rent the farm; that he immediately thereafter called upon appellant and demanded of him a rescission of the contract and a reconveyance of said properties, which demand was refused by him; that at this time appellant said he would aid and assist appellee in making a good trade of the Starke County lands; that appellant conspired with one Alonzo Barkhurst to further cheat and defraud appellee, by obtaining from him, said Starke County lands at a time when said Jester was in a distressed state of mind by reason of his disappointment occasioned by the fraud already practiced upon him by appellant; that for the purpose of carrying out his design to defraud appellees out of said lands in Starke County, appellant transferred four town lots to one Courtwright, the said Courtwright pretending to exchange said town lots for five tracts of land in Georgia, containing in all 2,450 acres; that in order to conceal his identity in the transaction, appellant caused the deed for the lands in Georgia to be executed to Alonzo Barkhurst and appellant then caused Barkhurst to approach Jester and propose a trade of said Georgia lands for his Starke County farm; that said Barkhurst had no interest in said land but was acting for and on behalf of appellant, and so acting did approach appellee and represented that the Georgia land was worth \$10 per acre and that the title was good in him, and presented an abstract, which did show title as represented; that appellant offered to assist appellee in said trade and examined said abstract and pronounced the title good, and representing that he was a friend to appellee, advised him to make the trade, and said he was well acquainted with the men who had conveyed the land to Barkhurst and that in his opinion it was an elegant trade to make; that he had some knowledge of the land in Georgia; that appellee relied upon said statements and representations of appellant and said Barkhurst and believed them to be

same, he and his wife entered into a deed; that thereafter, on May 4, 1906, a deed was executed between said parties; that appellees sent their deed to be recorded in Georgia, for record, and therefor the first time the fraud that had been practiced in reference to the Georgia lands; that the deed to them was false, forged and procured through the instrumentality of appellees to convey said lands to appellees, which lands belonged to Barkhurst, to appellant, and that appellant had full knowledge of the circumstances, knew the title to the lands was in Barkhurst and was fraudulent; that appellant misrepresented, and knowingly and unlawfully cheat and defraud appellees out of their money by means aforesaid; that when coming to the fraud so practiced upon appellees, said Georgia land appellant again attempted to dispose of the said lands but failed to do so; that appellees by reason of the conspiracy have been damaged in that said mortgage notes given by appellees have been canceled, that appellees recover \$10,000 and that the judgment be decreed in Tippecanoe County, Indiana,

its facts substantially as alleged in the petition, the facts thereof need not be stated here, but the following: that the business of appellant, was and for many years had been and is, as a farmer and builder; that appellant is a farmer and a dealer in real estate and that appellee's 117 acres of real estate is of the value of \$65 per acre; that on May 9, 1906, owned personal property

of the value of \$800; that the value of the 210 acres in Starke County does not exceed \$25 per acre; that on November 6, 1906, at the request of appellant, appellee, William P. Jester, went with appellant to Starke County, Indiana, to look at a farm of 240 acres, which he proposed to trade for appellee's said 117 acres; that said Jester had never before been in Starke County and knew nothing of the quality, condition and value of farm lands in that county; that they inspected said farm of 240 acres and examined the soil by digging into it and by other means of observation at more than a dozen places and said Jester did not know that appellant owned or claimed to own any other land in said county; that in the afternoon of said day appellant said he wished to go to another farm some three miles distant, and see his tenant and requested appellee to accompany him which he did; that when they reached said farm which contained 210 acres; appellant drove across the farm, conversed with his tenant and then called appellee's attention to the fine soil of a small tract of plowed ground; that appellee was not out of the buggy while on said farm except to open a gate and made no examination of the buildings or land except as above shown and at the time had no thought or intention of purchasing the farm; that after leaving said farm and while driving back to the railroad station appellant told appellee a great many things about his business and his favorable treatment of all those who dealt with him and that all those who took his advice had prospered, and offered to trade him the farm of 210 acres; that thereupon said Jester asked appellant for his advice about the land, told him he was inexperienced in trading in farm lands and stated that he would place himself entirely in his hands and rely upon his judgment, and then asked his advice about trading for the 210 acres instead of the 240 acres they had examined; that appellant told him it would be the best trade for him to take the 210 acres; that it was as good in every particular as

the 240-acre tract; that the soil was just as good and as deep as that of the farm they had examined; that it was of the same quality and equally as suitable for agricultural purposes; that it was all as good as the portion he had pointed out to appellee. The court also found that appellant had the full confidence of said appellee at that time and the latter was easily influenced which fact was known to appellant; that appellant represented the farm to have a deep and productive soil over all its surface except three acres around the buildings and to be of the value of \$75 per acre, which facts were relied on and believed by said appellee; that they started on their journey from Lafayette at 2 a. m. on November 6, and returned home at 3 a. m. of the next day and at 7 a. m. appellant came to the home of appellee to proceed to look at the 117-acre farm, and shortly thereafter signed a written contract to trade on the terms proposed by appellant; that the soil of said 210 acres was not as good as the soil of the 240 acres shown to said appellee which fact was well known to appellant; that the soil of said 210 acres was composed largely of quicksand and more than two-thirds of it was sandy and had a top soil but two or three inches in depth; that not to exceed 25 acres was as good as the soil of the 240 acres and suitable for farming purposes; that said appellee in March, 1907, visited said farm for the first time after purchasing the same; that during all said time he relied on the representations of appellant as to the depth and character of the soil and the value of said land and believed the facts to be as represented by appellant; that said representations were false and known by appellant to be false when made and were made for the purpose of deceiving said appellee and defrauding him out of his said farm; that appellees resided in West Lafayette, Tippecanoe County, Indiana, and said 210 acre farm was situate sixty miles from that place; that appellee made no further investigation as to the character of the soil after trading for said farm until his visit there in March when he

and his prospective tenant examined the same and found it to be as above stated; that "said William P. Jester is not a strong man physically, is possessed of a quiet, unassuming and confiding disposition and is easily influenced, and was easily influenced and persuaded by said John F. Judy, and that the statements and representations made by the said Judy, taken in connection with the disposition of the said Jester, his physical strength and want of experience, was such as to and did in fact deceive and mislead the said Jester and over-persuaded him to believe and accept as a fact the false and fraudulent statements and misrepresentations made by the said Judy to the said Jester as above found."

The court then finds the facts in much detail to the effect that the transaction relating to the Georgia land was a sham inspired and directed by appellant; that the other persons who appear therein were his agents and tools and all the dealings and representations were fraudulently made to avoid the effect of the fraud in the first deal and to deprive appellees of all their property; that as soon as said Barkhurst obtained the deed of appellees for said Starke County land he immediately conveyed the same to appellant; that said William P. Jester relied upon appellant, believed his statements in regard to said lands and made the trade upon his representations and advice; that appellant knew all the facts, that his statements and those made by his agents and coconspirators were false and fraudulent and were made for the purpose of cheating and defrauding appellees out of their property.

The questions relating to the sufficiency of the complaint and the conclusions of law may properly be considered together. Two principal propositions are relied upon by appellant: (1) The complaint states no cause of action in favor of appellee, Elizabeth Jester, and is therefore insufficient, as to both appellees suing jointly; (2) the complaint proceeds upon the theory of fraud and the facts alleged are insufficient to show actionable fraud against appellant.

Where the court has made a special finding of facts
1. and stated its conclusions of law thereon, to which the appellant has duly excepted, if the facts are fully and correctly found within the issues, the exceptions to the conclusions of law present the same questions as the overruling of the demurrer to the complaint. *Timmonds v. Taylor* (1911), 48 Ind. App. 531, 96 N. E. 331; *Town of Cicero v. Lake Erie, etc., R. Co.* (1913), 52 Ind. App. 298, 97 N. E. 389, 393. There is no contention here that the facts are not fully and correctly found, but appellant contends that the facts found are insufficient to warrant the conclusions of law. The complaint charges, and the facts found show, that appellees were husband and wife; that by the fraudulent transactions alleged they lost whatever interest they had in the 117 acres of real estate in Tippecanoe County and eight hundred dollars worth of personal property and received nothing therefor. The liability arises from the fraud alleged relating to the several transactions and is not to be determined by separating each transaction from the other. The theory of the complaint and the facts found, show that appellant by fraud and conspiracy pursued appellees through the several transactions and until he had deprived them of all their property. Those who assisted in carrying out the conspiracy were but his agents and tools.

On this state of facts the first question to be determined is whether the inchoate interest of the wife in her husband's lands out of which he is so defrauded is such an interest as to make her either a proper or necessary joint plaintiff with her husband in an action for damages based upon such alleged fraud. It has been held that the release by a wife of her inchoate interest may be a valuable consideration for
2. a promise to her. Also, that when a wife joins with her husband in the conveyance of his land, it will be presumed, in the absence of any special agreement to the contrary, that the inducement for the release of her inchoate

right, as to the grantee, was the consideration paid by the latter for the land so conveyed. *Fleming v. Reed* (1898), 20 Ind. App. 462, 468, 49 N. E. 1087; *Jarboe v. Severin* (1882), 85 Ind. 496, 498; *Worley v. Sipe* (1887), 111 Ind.

238, 12 N. E. 385. The wife's interest in her hus-

3. band's real estate, in Indiana, is an estate in the land itself, and not a mere encumbrance resting upon it.

Tanguay v. O'Connell (1892), 132 Ind. 62, 63, 31 N. E. 469; *Bever v. North* (1886), 107 Ind. 544, 8 N. E. 576; *Clements v. Davis* (1900), 155 Ind. 624, 632, 57 N. E. 905; *Frain v. Burgett* (1898), 152 Ind. 55, 66, 50 N. E. 872, 52 N. E. 395.

The statute (§262 Burns 1908, §262 R. S. 1881) pro-

4. vides that "All persons, having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs." This statute is to be liberally construed, but the rule still obtains that the complaint must state a cause of action in favor of all the plaintiffs. The grievance must be common to the several plaintiffs and each must be interested in the relief asked or some part of it, but it is not essential that their interest in the judgment be the same or equal. *American Plate Glass Co. v. Nicoson* (1905), 34 Ind. App. 643, 647, 73 N. E. 625; *Larsen v. Groeschel* (1884), 98 Ind. 160. While the ques-

5. tion in the exact form presented here does not seem to have been decided in Indiana, kindred questions already decided considered in connection with our statute fully warrant the conclusion that a complaint alleging facts which show that a husband has been defrauded out of real estate, title to which was in his name, and in the conveyance of which his wife joined, shows such interest in the wife as makes her a proper party plaintiff with her husband in a suit to recover damages for such alleged fraud. *Staser v. Gaar, Scott & Co.* (1907), 168 Ind. 131, 79 N. E. 404; *Staser v. Garr, Scott & Co.* (1906), 38 Ind. App. 696, 78 N. E. 987; *Lake Erie, etc., R. Co. v. Priest* (1892), 131 Ind. 413, 31

N. E. 77; *Tanguay v. O'Connell*, *supra*; *City of New Albany v. Lines* (1899), 21 Ind. App. 380, 386, 51 N. E. 346; *Simar v. Canaday* (1873), 53 N. Y. 298, 304, 13 Am. Rep. 523.

Appellant also asserts that the facts relied on to show fraud amount only to an expression of appellant's opinion as to the value of the land and further that appellee William P. Jester had the opportunity to ascertain for himself the quality and value of the Starke County land, and if he failed so to do, his charge, that he was deceived, will not avail

because of his negligence. Representations as to value

6. are not ordinarily sufficient to support a charge of fraud, but under some circumstances such representations are affirmations of fact. If the vendor of real estate assumes to have special knowledge of the value of the property and the vendee is ignorant of the value and inexperienced in such transactions, and these facts are known to the vendor, who also knows that the vendee trusts entirely to his good faith and judgment as to value, representations of value made under such circumstances as the basis of a contract between the parties may be regarded as representations of material facts. *Manley v. Felty* (1896), 146 Ind. 194, 199, 45 N. E. 74; *Culley v. Jones* (1905), 164 Ind. 168, 171, 173, 73 N. E. 94. In *Culley v. Jones*, *supra*, on pages 172, 176 it is said: "Whether such representations as to value are merely the expressions of an opinion, or affirmations of facts to be relied upon, is a question of fact to be determined by the jury. * * * And where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced to forbear inquiries which he would otherwise have made, and damage ensues, the party guilty of the fraud will be liable for the damage sustained. * * * Whether the alleged representations were such as appellant had the right to rely upon, or whether they were reasonably calculated to deceive such a person as appellant, were questions of fact for the jury. * * * 'The design of the

law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves.' ''

See, also, *Simar v. Canaday*, *supra*, 306.

But the charge in the complaint and the finding of facts go much farther than a mere statement of value. It is

found that appellant stated that the farm of 210 acres
7. was first class agricultural land, composed of black loam with a clay subsoil and was suitable to the raising of all kinds of grain; that the whole farm was as good as the small portion pointed out to said appellee; that the soil was as deep and as good and of the same quality as that of the 240 acres, and the farm was as good in every particular as the one he had examined for himself; that it had a deep and productive soil over all its surface except about three acres. These are material representations of existing facts charged in the complaint and found by the court to have been made knowingly and falsely for the purpose of defrauding appellees. The complaint therefore was not insufficient nor the conclusions of law erroneous because of the absence of material facts showing fraud. *Boltz v. O'Conner* (1910), 45 Ind. App. 178, 183, 90 N. E. 496; *Harris v. McMurray* (1864), 23 Ind. 9; *Norris v. Tharp* (1878), 65 Ind. 47; *Jones v. Hathaway* (1881), 77 Ind. 14, 21; *Bish v. Beatty* (1887), 111 Ind. 403, 407, 12 N. E. 523; *Coulter v. Clark* (1903), 160 Ind. 311, 315, 66 N. E. 739; *Loucks v. Taylor* (1899), 23 Ind. App. 245, 249, 55 N. E. 238; *Kramer v. Williamson* (1893), 135 Ind. 655, 660, 35 N. E. 388.

In *Manley v. Felty*, *supra*, on page 198 it is said: "Upon the question of diligence, it has been settled that a contracting party may rely on the express statement of an
8. existing fact, the truth of which is unknown to him, but which is asserted by the other contracting party, as a basis for mutual agreement. * * * Of course, this proposition must be regarded in the light of another which

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is equally well settled, that one may not rely upon the truth of a statement which he knows to be untrue, or which is manifestly false." See, also, *Cully v. Jones*, *supra*, 171; *Leonard v. Springer* (1902), 197 Ill. 532, 538, 64 N. E. 299.

In this case the facts show a fraudulent conspiracy to cheat appellees out of their land. Appellee William P. Jester

was taken into a section of country with which he was

9. wholly unacquainted. This fact, his credulity, his ignorance of values and inexperience were known to appellant. He was shown one farm with a view of trading for it and then taken to another which he only casually observed with no idea or intention of purchasing it. In view of subsequent events the conclusion is inevitable, and the proof sufficient to show, that appellant employed this plan as a part of the means by which said appellee was induced to trade for the 210 acres without learning its true character or value. He had left the farm and was on the way back to the station to take his train for home before the trade was suggested. He heard the self-praise of appellant, his alleged helpful advice to others in similar transactions and fell into the trap so adroitly set for him. They traveled in the night and early next morning said appellee was at home sixty miles away from the farm, but still under the influence and domination of appellant. There was then no convenient means by which he could learn the facts for himself. The knowledge he obtained first hand was inadequate and deceptive. It cannot be said as a matter of law that his negligence was such as to bar his right of recovery for

fraud practiced upon him. Appellant assumed to

10. know the facts and made his statements for the purpose of inducing appellees to part with their land, knowing that they were ignorant of the facts and relying implicitly upon him for a true representation of the farm. He knowingly and purposely deceived them. He cannot now escape from the consequence of such conduct for two reasons: (1) Because he assumed to know the facts and

made false statements of material matters to induce appellees to make the trade, knowing at the time that they were false and that appellees were relying upon him for the truth. (2) Because by his management, connivance, trickery, and overpowering influence, appellees were prevented from making an investigation to ascertain the facts for themselves, and induced to rely upon his representations.

Upon the whole record the case seems to have been fairly tried and a correct result reached. While it is the privilege of the defendant to rely upon the weakness of the plaintiff's case and not to testify in his own behalf, in view of the serious charges of fraud and misrepresentation made against appellant, the truth or falsity of which must have been known to him, it is at least remarkable that he failed to testify and enlighten the court by his version of the transactions. Where a party has in his own keeping and

11. at his command, testimony presumably favorable to him, his failure to produce such testimony warrants the presumption that the testimony if produced would be unfavorable to him. *Indiana Union Traction Co. v. Scribner* (1911), 47 Ind. App. 621, 631, 93 N. E. 1014; *Lee v. State* (1901), 156 Ind. 541, 548, 60 N. E. 299.

The appellant has pointed out no available error. The case presents many facts which show a flagrant disregard of the principles of fair and honest dealing and a wilful and persistent design to defraud. The apparent credulity and helplessness of appellees while under the influence of appellant instead of excusing his conduct, under all the facts of the case, only add to the enormity of such conduct, which should be discouraged by all available means. The judgment is therefore affirmed with ten per cent damages.

Ibach, C. J., Hottel, Lairy and Adams, JJ., concur. Myers, J., concurs in result but dissents to assessment of penalty.

NOTE.—Reported in 100 N. E. 15. See, also, under (1) 2 Cyc. 718; (2) 14 Cyc. 952, 956; (3) 14 Cyc. 924; (4) 31 Cyc. 103; (5)

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20 Cyc. 94; (6) 20 Cyc. 51; (7) 20 Cyc. 59; (8) 20 Cyc. 33; (9) 20 Cyc. 32, 57; (10) 20 Cyc. 61; (11) 16 Cyc. 1059. As to what false representations in respect of value give vendee a suit against vendor, see 18 Am. St. 555; 15 Am. Rep. 382.

**THE PITTSBURGH, CINCINNATI, CHICAGO AND ST.
LOUIS RAILWAY COMPANY v. FOUST,
ADMINISTRATRIX.**

[No. 7,882. Filed October 17, 1912. Rehearing denied March
14, 1913.]

1. **NEGLIGENCE.—Elements of Action.—Complaint.**—Where the breach by defendant of a legal duty owing by him to the plaintiff, and an injury to plaintiff resulting from such breach, is shown, actionable negligence exists, but the absence of either of the three elements will render the complaint bad. p. 94.
2. **PLEADING.—Complaint.—Sufficiency.—Recitals.**—The sufficiency of a complaint stating facts constituting all the elements of actionable negligence is not affected by the reason that it also contains the statement of facts by way of recital. p. 95.
3. **RAILROADS.—Injuries to Persons on Tracks.—Licensees.**—The rule that a mere licensee enjoys the license subject to its attendant risks and concomitant perils, and that the only duty owing to a licensee by one granting the license is to protect him from wilful injury, is not applicable where a railroad company had contracted for the installation of a system of interlocking devices and had licensed decedent, as an employe of the contractor, to go upon its tracks in carrying on the work of installation, but such rule is to be confined to cases where the licensee is granted permission to go upon the premises of the owner for purposes of his own, and in which the owner has no interest. p. 95.
4. **NEGLIGENCE.—Legal Status of Injured Person.—Complaint.**—The legal status of a person at the time of his injury or death through the negligence of another is not to be determined by its characterization in the complaint, but from all the facts averred. p. 96.
5. **RAILROADS.—Injury to Persons on Tracks.—Complaint.—Sufficiency.**—Where decedent, who was killed by one of defendant's trains while he was on the track in the employ of a contractor engaged in installing a signal system for defendant, the allegation of the complaint that decedent's duty required him to be upon the tracks at the place where the injury occurred and that he was there by invitation of defendant, with the full knowledge

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of defendant, its servants and agents, was sufficient to raise a legal duty against defendant to the same extent as if decedent had been one of defendant's employes. p. 96.

6. RAILROADS.—*Injury to Persons on Tracks.—Employe of Construction Company.—Evidence.—Sufficiency.*—In an action for negligent death on the defendant's railroad track of one claimed to have been employed by a contractor at the time engaged in installing a signal system for defendant, there could be no recovery by plaintiff in the absence of proof that a contract existed between decedent's employer and defendant whereby decedent was authorized to go upon the tracks. p. 97.

7. RAILROADS.—*Injury to Persons on Tracks.—Employe of Construction Company.—Evidence.—Sufficiency.*—In an action for negligent death on the defendant's railroad track of one claimed to have been employed by a contractor at the time engaged in installing a signal system for defendant, evidence merely showing that the contractor was installing a signal system was not sufficient to show contractual relation between him and defendant that would authorize decedent to be upon defendant's tracks, where it was shown that three railroads crossed at the particular place. p. 97.

8. RAILROADS.—*Injury to Persons on Tracks.—Employe of Construction Company.—Negligence.—Evidence.—Sufficiency.*—Where the negligence charged was in an attempt to make a flying switch whereby decedent was run over by a cut of cars while he was on defendant's tracks in the employ of a construction company engaged in installing a signal system, and the undisputed evidence showed that decedent's work did not require him to go upon the tracks, that decedent at his own request was permitted to walk up the west-bound main track some distance to procure a pick, that on looking back he saw a train approaching from the east and he stepped over on the east-bound track and was run down and killed by a cut of cars running west and pushed by an engine, that there was nothing to obstruct decedent's view of the approaching cut of cars, and it was not shown that the cut of cars was being run at a rapid and dangerous speed, nor that defendant's servants had any knowledge of decedent's presence at the place of injury, a judgment for plaintiff is not supported by sufficient evidence. p. 97.

From Starke Circuit Court; *Francis J. Vurpillat*, Judge.

Action by Mary E. Foust, administratrix of the estate of Samuel A. Foust, deceased, against The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

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loss, for appellant.

C. Miller and Frank M. Trissal, for appellee.

P. J.—Appellee's decedent was killed on January at or near the town of North Judson, Indiana, over by a car operated by appellant's servants on's railroad. After the usual formal averments, the complaint states in detail the location of appellant's buildings, the location of street and railroad crossings, the number of people using the crossings, and and proceeds: "That 300 feet north from the of the platform of said defendant's passenger located the tower and signal house of said defendant, and the railroads there that cross it. That pre-the date aforesaid, said defendant had contracted Union Switch and Signal Company, to construct ll about, over and upon its tracks, at said town, a interlocking devices for use in the operation of railroad, and had licensed said Union Switch and company and its employees to go upon and about said carrying on the work of constructing and install-interlocking devices. That the decedent received at the hour of 11:25 a. m. on the date before mentioned at the time of receiving it he was an employee Union Switch and Signal Company, working along other laborers, in the construction and installation interlocking works, the place where they were carrying their work being upon said defendant's main tracks, the north end of the platform of the defendant's station and said tower house, and his and their such laborers required him and them to be upon t said defendant's main railroad tracks at the place d work was being carried on, and where he received ies, and he was there at the place where he was in-the invitation of said defendant, and with the full re of the said defendant, and its servants and agents,

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engaged in the operation of its cars and engines, through and in said town of North Judson, and over and upon the tracks where said interlocking works were being installed. That while being at the place above mentioned in carrying on the work that his duties required, the said decedent was exercising due care and diligence for his own safety, and to avoid injury to himself, from the passage and running of cars and engines, on and about the tracks at which he was at work, but notwithstanding his exercise of care, he was, without his own fault, run over and crushed by one of said defendant's freight cars, his death resulting from being so crushed, said car being part of a local freight train which was negligently and carelessly managed and operated by said defendant's servants in charge thereof, in an attempt by them to make what is termed in railroading a 'flying switch' that in attempting to make such 'flying switch' they detached four freight cars from a local freight train of cars, under their care, and with an engine attached to said four cars backed the same at a rapid and reckless rate of speed upon one of the two main tracks at precisely the same moment of time that a through freight train was passing on the other parallel main track of said defendant's railroad. That said decedent seeing said through freight train moving toward him, and to escape injury from it, passed from the main track on which it was coming, and on which he was then at work, over to said other main track, on which said freight cars of said local freight train were being backed, that being the only place to which he could then go to get out of the way of and to escape injury from said moving through freight train; that in so passing over from one track to the other, his back was in the direction from which said backing cars were coming toward him, he at the time of so passing over to said track not knowing and having no means whatever of knowing or ascertaining, that any cars were being backed upon said track, or any reason to suspect or believe that they would be so backed, or that

said track was not clear, and not being in a position in which he could see, hear or know that they were being so backed. That no flagman or other person was upon or about said backing cars, or upon the track upon which they were being backed to give any notice, warning or signal of their approach, nor was any notice, warning or signal of their approach given. The plaintiff avers that the act of making 'flying switch' within the corporate limits of said town was, because of the facts hereinbefore stated, at all times one of great danger to human life, and was particularly so at the time and place and under the circumstances hereinbefore stated, and was entirely unnecessary and wrongful in the operation of said defendant's railroad through said town, and the act of so backing said cars at said time and place, in an attempt to make such 'flying switch' and the omission to give any warning or signal by the persons in charge of said car, of their intention to make such switch, were all acts of negligence, all contributing and concurring to cause, and did cause said decedent's injury and death, he himself being entirely without fault and exercising due care to avoid such injury."

To this complaint the appellant filed a demurrer for want of sufficient facts, which demurrer was overruled by the court, and the cause put at issue by an answer in denial. Trial by jury, and verdict returned for appellee. Appellant's motion for a new trial was overruled by the court, and judgment rendered on the verdict. Errors assigned and relied upon for reversal are: (1) error of the court in overruling the appellant's demurrer to the amended complaint; (2) error of the court in overruling appellant's motion for a new trial. We will consider the errors in the order of their assignment.

The sufficiency of the complaint in this case, as well as in all cases involving actionable negligence, may be

1. determined by the following tests: Do the facts alleged show a legal duty owing by the defendant to

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protect the plaintiff at the time and place of the injury of which complaint is made? Do the facts show a breach of that duty by the defendant? And do the facts further show an injury arising out of such breach? If all of these elements are brought together by proper averments, they constitute actionable negligence. But the absence of any one

renders the complaint bad. A casual reading of the

2. complaint under consideration will disclose a notable absence of direct averments, and a general use of the participle instead of the finite verb. This form of pleading should be condemned, but we think the complaint before us is good independent of the facts attempted to be shown by way of recital.

Appellant strongly urges that as it affirmatively appears from the complaint that appellee's decedent was at the time of his injury and death an employe of the Union

3. Switch and Signal Company, and as such was licensed to go upon the tracks and grounds of appellant, his legal status was that of a mere licensee and no right of action arose in favor of his personal representative on account of his death through the negligence of the appellant. It is true that a mere licensee enjoys the license subject to its attendant risks and to its concomitant perils. The only legal duty owing to a licensee by one granting the license is to protect the former from wilful injury. *Thiele v. McManus* (1891), 3 Ind. App. 132, 134, 28 N. E. 327; *Evansville, etc., R. Co. v. Griffin* (1885), 100 Ind. 221, 223, 50 Am. Rep. 783; *Indiana, etc., R. Co. v. Barnhart* (1888), 115 Ind. 399, 408, 16 N. E. 121; *City of Indianapolis v. Emmelman* (1886), 108 Ind. 530, 532, 9 N. E. 155, 58 Am. Rep. 65; *Faris v. Hoberg* (1893), 134 Ind. 269, 276, 33 N. E. 1028, 39 Am. St. 261. This rule, however, must be limited to cases where the licensee is granted permission to go upon the premises of the owner for purposes of his own, and in which the owner has no interest. In this case, the averment of the complaint is that appellant had contracted with the immediate em-

ployer of appellee's decedent to install a system of interlocking devices, and had licensed decedent, as one of the contractor's employes, to go upon the tracks in carrying on the work of installation. It cannot be said that appellant had no interest in the work being done, or that the license granted to the decedent to go upon appellant's tracks was

wholly for a purpose of his own. The legal status of

4. the decedent will not be determined by its characterization in the complaint, but will be determined from all the facts averred. In *Cleveland, etc., R. Co. v. Powers* (1909), 173 Ind. 105, 116, 88 N. E. 1073, 89 N. E. 485, the court said: "An invitation is implied where some benefit accrues or is supposed to accrue to the party extending the invitation, or is in the interest of both parties, or consists in going upon the premises upon the business of the owner." Mr. Campbell, in his treatise on negligence, says: "The principle appears to be that *invitation* is inferred where there is a common interest or mutual benefit, while a license is inferred where the object is the mere pleasure or benefit of the person using it." Campbell, Negligence §33.

5. Moreover, it appears by a further averment of the complaint that the duty of decedent as a laborer required him to be upon appellant's tracks at the place where the work was being carried on and where he received his injury, and that he was in the place where he was injured by the invitation of appellant, with the full knowledge of appellant, its servants and agents. In the recent case of *East Hill Cemetery Co. v. Thompson* (1913), *post* 417, 97 N. E. 1036, this court held that a complaint which averred that the plaintiff was lawfully in and upon the grounds and premises of the defendant, by and with the consent and invitation of the defendant, was sufficient to show that plaintiff was not a trespasser or a licensee. And in the case at bar we think the averment that decedent was upon the tracks by the invitation of appellant states a fact and not a conclusion, and raises a legal duty against appellant to the same

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extent as if decedent had been one of appellant's employes. There was no error in overruling the demurrer to the complaint.

The second specification of error, the overruling of appellant's motion for a new trial, calls in question the sufficiency of the evidence to support the verdict. Appellant introduced no evidence, but at the conclusion of appellee's evidence, moved the court to instruct the jury to return a verdict in its favor. This motion was overruled by the court, which ruling was assigned as one of the grounds for a new

trial. It is first urged that there is no proof of any

6. contract between the Union Switch and Signal Company and the appellant. Such proof is important, as the right to recover for the negligence of appellant is dependent upon some contractual relation being shown between decedent's employer and the appellant, whereby decedent was authorized to go upon appellant's tracks. There

was no evidence whatever of invitation express or

7. implied, the sole reliance being upon the alleged contract. The only evidence upon this subject was by the witness Miller, who testified that Foust at the time of his injury and death was working for the Union Switch and Signal Company; and the witness Bernethy, who testified that an interlocking system was being installed by contractors. As it is shown that three railroads crossed at this point, no lawful inference could be drawn from the evidence offered that would support the allegations of the complaint. Failure to make this proof was fatal to the right to recover.

Again appellant insists that there was no proof of the negligence charged in the complaint. It will be recalled

that the negligence charged was that decedent on the

8. date of his injury was employed by the Union Switch and Signal Company, working with fifty other laborers in the construction and installation of interlocking works on the defendant's main tracks, between the north end of

the platform of defendant's passenger station and the tower house, a distance of 300 feet; that it was necessary for such laborers to be upon appellant's tracks where the work was carried on; that a cut of cars was negligently and carelessly managed by the defendant's servants, in an attempt to make a "flying switch" whereby the cars were backed on one of the two main tracks at a rapid and reckless rate of speed at the same moment a through freight train was passing upon the other main track. The appellant was clearly negligent in attempting to make a "flying switch" over 300 feet of its main track where fifty men were employed. The proof, however, gives no support to the allegations of the complaint. The undisputed facts are that the decedent on the date of his injury was employed by the Union Switch and Signal Company, and engaged with one Lewis Miller in mixing concrete near the tower house and the Three I crossing. His work did not require him to go upon the tracks. Soon after commencing work, the decedent with Miller and two others had gone up the track about 900 feet from the place where he was employed for a load of gravel, which had been unloaded on the space between the two main tracks. A pick was left at the place where the gravel was secured, and shortly before noon, the foreman directed Miller to go and get it. Decedent asked that he be permitted to get the pick, and upon consent being given started northwest on the west-bound main track. He had proceeded a short distance north of the Erie crossing, when, by looking back, he discovered a through freight approaching from the east. He then stepped over on the east-bound track, and was run down and killed by a cut of cars running west, pushed by an engine. There was nothing to obstruct his view of the approaching cut of cars, and no one saw him killed. The servants of appellant were not attempting to make a flying switch at the time decedent was killed, but the cars were being run westward for the purpose of attempting a flying switch on

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the return eastward. There was no evidence that the cars were being run at a rapid and dangerous rate of speed. The decedent was not in the place where the complaint alleges he was employed, and where his duties required him to go upon the tracks, but was at a point five or six hundred feet west of the tower and beyond the Erie crossing. There was no flagman on the first car to give warning, and no signals were given, but it is not averred in the complaint that it was the duty of appellant to give signals or to provide such flagman.

It was not shown by the evidence that appellant's employes operating the engine and cut of cars had any knowledge of the presence of the decedent at the place of his injury, or had any knowledge that workmen or other persons were likely to be in that immediate vicinity. There was no street or highway crossing within a quarter of a mile in either direction. That the decedent knew of the cut of cars is evident from the fact that before going over the Erie crossing, he spoke to one Trinosky, a section man engaged in clearing up the tracks between the Erie and the Three I crossings, and said to him, "look out, they are coming over the cross-over." That he had reference to the switching cars is evident from the fact that the cross-over between the two main tracks could not be used by the west-bound freight train then coming forward on the west-bound track. Without considering other errors assigned as causes for a new trial, it already appears that the judgment must be reversed. The case presents many features likely to arouse sympathetic interest, but the rules of law cannot be adjusted to meet the exigencies of individual misfortune.

The judgment is reversed with instructions to the court below to sustain appellant's motion for a new trial.

NOTE.—Reported in 99 N. E. 493. See, also, under (1) 29 Cyc. 565; (2) 31 Cyc. 71; (3) 33 Cyc. 756, 764; (4) 29 Cyc. 567; 33 Cyc. 865; (5) 29 Cyc. 566; 33 Cyc. 866; (6) 33 Cyc. 889. As to one's legal duty toward others in regard to safety and liability for

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the breach, see 77 Am. St. 26. As to trespassers on railroad track and what duty, if any, the company owes them, see 30 Am. St. 53. For a discussion of making a flying switch as negligence, see 10 Ann. Cas. 15; Ann. Cas. 1912 D. 342.

SCOTT v. DILLEY ET AL.

[No. 7,782. Filed March 25, 1913.]

1. **APPEAL.—Right to Appeal.—Acceptance of Benefits of Judgment.**—A party cannot prosecute an appeal and thereby reverse a judgment the benefits of which, with full knowledge of the facts, he has voluntarily accepted. p. 103.
2. **APPEAL.—Right to Appeal.—Acceptance of Benefits of Judgment.—Guardian and Ward.—Partition.**—Where, in a partition proceeding against a minor defendant, and in which the guardian was not a party, such minor filed a cross-complaint seeking to establish a trust in the property, and judgment was against him on such cross-complaint and decreeing partition as prayed in the complaint, the act of defendant's guardian in taking possession of the land set off to such defendant and deriving the benefit therefrom did not operate to estop the defendant from prosecuting an appeal. p. 104.
3. **APPEAL.—Waiver of Error.—Briefs.**—An assignment of errors questioning the sufficiency of answers is waived, where appellant, in his brief, has failed to point out any objections thereto. p. 104.
4. **TRUSTS.—Resulting Trusts.—Evidence.—Sufficiency.**—Evidence showing that a husband and wife joined in a conveyance of the wife's land, and about the same time bought another farm which was taken in the name of the husband, and that some part of the proceeds of the first farm was used in the purchase of the second one, is in itself insufficient to show a resulting trust in favor of the wife, or her heirs, in the land so purchased in the name of the husband, under the provisions of §4019 Burns 1908, §2976 R. S. 1881. p. 104.
5. **TRUSTS.—Resulting Trusts.—Enforcement.—Lapse of Time.**—Equity will not enforce an alleged trust, the nature of which is rendered obscure by time and acquiescence. p. 106.
6. **TRUSTS.—Resulting Trusts.—Creation.**—A resulting trust must arise, if at all, at the time of the execution of the conveyance. p. 106.
7. **TRUSTS.—Resulting Trusts.—Creation.**—Defendant in a partition suit, who sought by cross-complaint to establish a trust in

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the property involved, had the burden of proving the material averments of such cross-complaint. p. 106.

8. TRUSTS.—*Enforcement.—Limitation of Actions.*—Although the statute of limitations does not commence to run against a trust until it has been openly disavowed, evidence, in an action to establish a resulting trust, from which the trial court may have inferred that if the trust had ever in fact been created, the acts and conduct of the holder of the legal title since 1878 were such as to indicate an open disavowal, authorized a recovery on answers setting up the twenty years' statute of limitations. p. 107.

From Sullivan Circuit Court; *Charles E. Henderson*, Judge.

Action by Rose Dilley and others against Ray Scott. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Hunt & Gambill, I. H. Kelley and C. W. Welman, for appellant.

George W. Buff, J. W. Lindley and W. P. Stratton, for appellees.

HOTTEL, J.—This is an action by appellees for the partition of certain real estate in a part of which appellant, by way of cross-complaint, seeks to have a trust declared.

The facts which underlie and made possible the litigation are in substance as follows: On August 9, 1868, Elijah H. Dilley and Mary Ann Neal were united in marriage. The wife, Mary Ann Dilley, was the owner of a farm which she and her husband, afterwards, about 1872 or 1873 disposed of for the sum of \$3,675. The husband, about this time bought another farm, which is a part of the land sought to be partitioned. The wife, Mary Ann Dilley, died in the year 1878, leaving as her heirs, her said husband and two children, to wit: Tressa B. Dilley and Nora Dilley. Nora Dilley died before her father, leaving as her heir, the cross-complainant, Ray Scott. Elijah Dilley married a second time and died in the year 1907, leaving as his only heirs, his widow, Rose Dilley, and two children by her, Harry D. Dilley and Elijah H. Dilley, and said child and grandchild by the first wife.

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Elijah H. Dilley, deceased, except said partition action. The grandchild, Ray, complaint in four paragraphs in each of which he avers a trust declared in that part of the land which was bought by the defendant at the time his wife sold her farm.

The first paragraph proceeds on the theory that the grandmother and furnished her husband the money for the land in question under an agreement with him to take and hold the land in trust for her, and that he was free from any fraudulent intent. The second paragraph is the same as the first except it avers that the grandfather traded his wife's farm for the land in question under the agreement set out in the first paragraph. The third paragraph is the same as the second in that it avers that he sold the two farms, but differs from the first in that it avers that the grandmother entrusted her husband with the land and that he, in violation of the trust received the land in question in his own name, heretofore, and that he received the entire consideration paid therefor. The fourth paragraph is the same as the third except it avers that she traded her land by her husband, that she gave him the money to buy another farm and that he bought the land in question and in violation of the trust received the land in his own name, etc. A demurrer to the first cross-complaint was overruled, but not to the second. The sufficiency of any of said para-

The widow of deceased, then filed an answer to the complaint in six separate paragraphs, the first of which was a general denial. All the other paragraphs in the answer to said cross-complaint in six paragraphs were in substance the same as the said complaint of Dilley. These answers set up in one paragraph the statute of limitations. A demurrer to the answers was overruled, and such rulings are assigned as

error. A trial by the court resulted in a finding and judgment for appellees on their complaint and against appellant on his cross-complaint. Appellant filed a motion for new trial which was overruled and this ruling is assigned and relied on as error.

We are first met with a motion to dismiss the appeal on the ground that appellant by and through his guardian, has taken possession of the land set off to him by the judgment of partition and has received and used the rents thereof and exercised other acts of ownership over such land. It is a

well-settled principle of law that a party will not be
1. permitted to prosecute an appeal and thereby reverse a judgment the benefits of which, with full knowledge of the facts, he has voluntarily accepted. *McGrew v. Grayston* (1896), 144 Ind. 165, 41 N. E. 1027, and authorities cited. But, it is insisted by appellant that his right to the one-sixth interest in the real estate which was set off to him, was conceded by appellees in their complaint and that inasmuch as the only issue in controversy was entirely on the cross-complaint, and the appeal was in fact an appeal from the judgment on such cross-complaint that the fact that his guardian took possession and control of the one-sixth of said real estate set off to him, was not an acceptance of the benefits of the judgment appealed from within the meaning of the principle of law above announced and should not operate as a waiver or release of error. If appellant's contention rested on this ground alone, we would have serious doubt as to its validity. While it is true that his right to a sixth of the land in controversy was not disputed, yet this sixth had never been set off to him, and, before the judgment, his interest was in the entire tract, and not in any particular part thereof. The reasoning in the case of *McGrew v. Grayston*, *supra*, would seem to indicate that appellant's acceptance of the particular part of said real estate set off to him in the partition proceeding, would operate as a waiver or release of error on appeal. But, the showing made by

the sworn motion in this case, does not show that appellant himself took possession of the forty acres so set off to him, but that such possession was taken by his guardian. A counter-affidavit filed by the appellant, avers in substance that, at the time of making such affidavit, he did not have possession of such real estate and that he had not had possession thereof at any time prior thereto, and that he had not at any time attempted to take possession of said real estate and had not exercised any authority over the same, and that he was then only twenty years of age. The guard-

ian was not a party to this suit. We find no express

2. authority in this State upon the subject of the effect of a guardian accepting for his ward the benefit of a judgment rendered in a suit against such ward affecting his real estate, but we are of the opinion that such acceptance by the guardian should not operate to estop the ward from prosecuting an appeal where the suit and judgment was against the ward. For this reason the motion to dismiss the appeal should be overruled. *Succession of Flower* (1848),

3 La. Ann. 292. Appellant nowhere in his brief either

3. under his points and authorities, or in his argument, has pointed out any objections to either of the paragraphs of answer, and his assignment of errors which questions their sufficiency will therefore be deemed waived.

The grounds of the motion for new trial relied on for reversal are: (1) The decision of the court is not sustained by sufficient evidence. (2) The decision of the court is contrary to law. In support of the first ground of said

4. motion appellant insists, in effect, that the facts of this case are clear, and that they show that Elijah H. Dilley, deceased, in the year 1872, sold the land of his then wife, Mary Ann Dilley, and took the money received from such sale, put it in the land in question and, under an agreement with her, took the title to such land in his own name to hold the same in trust for her, that the entire consideration was paid by the wife and the conveyance to the husband

was not made with any intent to defraud creditors; that a trust was thereby created in said land in favor of Mary Ann Dilley under §§4017, 4019 Burns 1908, §§2974, 2976 R. S. 1881, and that the cross-complainant as one of her heirs, is entitled to enforce such trust. We are unable to agree with appellant's view of the evidence. That appellant's grandmother owned a farm when she was married, which was afterward sold or disposed of by her and her husband, and that they, about this time, bought another farm is probably shown by the evidence with the clearness and certainty claimed by appellant's counsel, and the evidence would probably justify us in saying that some part of the money obtained from the sale of the wife's farm, went into the farm purchased and taken in the name of the husband. If these facts alone would entitle appellant to recover under his cross-complaint, the judgment below should be reversed. But the sections of statute upon which appellant relies, clearly indicate that he should have gone further with his proof. Under these sections, a resulting trust will arise in three different classes of cases, viz., "*First*, where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid. *Second*, where such alienee, in violation of some trust, shall have purchased the land with moneys not his own. *Third*, where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein in trust for the party paying the purchase money or some part thereof.'" *Toney v. Wendling* (1894), 138 Ind. 228, 232, 233, 37 N. E. 598. Appellant does not claim that there was any evidence to support a trust under either of said first two classes of cases, but insists that he proved an agreement by which it was understood between the husband and wife that the husband should hold the land in question in trust for the wife.

Upon the subject of the amount of the consideration paid by the wife for the land in question, and what understanding or agreement, if any, was had between her and her husband at the time of the purchase and conveyance to him of said land, the evidence is very uncertain and doubtful.

5. This no doubt resulted from the length of time intervening between the alleged creation of the trust and its attempted enforcement. This alone would furnish the trial court a reason for its decision. "If time and long acquiescence obscure the nature and character of an alleged trust, equity will refuse to enforce it." *Benson v. Dempster* (1899), 183 Ill. 297, 55 N. E. 651; see, also, *Parrett v. Palmer* (1893), 8 Ind. App. 356, 363, 35 N. E. 713, 52 Am. St. 479.

We might add that there was evidence showing that Mr. Dilley, the husband, gave his notes for the deferred payments on said land the last of which notes was not due until 1881, three years after the death of his first wife and two years after his second marriage and this note was not paid in full until after said second marriage. In the case of

6. *Tony v. Wendling, supra*, the Supreme Court said: "It is not possible to raise such a trust by the subsequent application of the money of a third person in satisfaction of the unpaid purchase money. It has been held many times that 'the resulting trust must arise, if at all, at the time of the execution of the conveyance.' " See authorities there cited, also, *Burkert v. Burkert* (1877), 58 Ind. 579; 15 Am. and Eng. Ency. Law (2d ed.) 1145.

The burden was on appellant to prove the material averments of his cross-complaint, and we can not say that the evidence in support thereof was of such a character as to authorize a reversal by this court of the decision of the trial court.

The proof also shows that Mary Ann Dilley, in whose favor it is claimed the trust was created, died in 1878 without having enforced or attempted to enforce such trust. Her

surviving husband afterwards married, continued to farm the land, retained and appropriated to his own use the rents and profits of said real estate. While it is true that

8. where a trust has been once created the statute of limitations will not begin to run against it until the trust has been openly disavowed, there is evidence in this case from which the trial court may have inferred that, if the trust had ever in fact been created, the acts and conduct of the deceased after the death of his first wife in 1878 were such as to indicate an open disavowal of such trust, in which case appellees were entitled to recover under their answers setting up the twenty years' statute of limitations. See *Cowen v. Henika* (1897), 19 Ind. App. 40, 43, 48 N. E. 809, and authorities there cited; 7 Ballard, Real Property §766 and authorities there cited.

We find no available error in the record. Judgment affirmed.

NOTE.—Reported in 101 N. E. 313. See, also, under (1) 2 Cyc. 651; (2) 2 Cyc. 654; (3) 2 Cyc. 1014; (4) 39 Cyc. 160; (5) 39 Cyc. 605; (6) 39 Cyc. 105; (7) 39 Cyc. 152; (8) 39 Cyc. 600-605. As to resulting trusts and the circumstances they arise from, see 51 Am. Dec. 751.

HILLYARD ET AL. v. ROBBINS.

[No. 7,901. Filed March 25, 1913.]

1. **APPEAL.—Review.—Evidence.—Judgment.**—A judgment will not be disturbed on the evidence if there is some evidence from which the trial court may have found facts sufficient to support the same. p. 110.
2. **MECHANICS' LIENS.—Foreclosure.—Complaint.—Amendment.**—Under §§400-403 Burns 1908, §§391-394 R. S. 1881, providing for the amendment of pleadings, the trial court has wide discretion in so doing, and since §8297 Burns 1908, Acts 1889 p. 257, relating to the filing of notice of an intention to hold a mechanic's lien, provides that the description of the lot or land in such notice shall be sufficient if from such description, or any reference therein, the lot or land can be identified, the action of the trial court, in an action to foreclose a mechanic's lien on land described in the notice as lot 31, in permitting the amendment of

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Int to show lot 32 instead, was not erroneous, in the absence of a showing that defendants were thereby in any way prejudiced or deprived of any right. p. 110.

MECHANICS' LIENS.—Notice.—Defective Description.—Amendment.—A defective description in a notice of mechanics' lien may be amended as to make it good if the notice contains any reference to the property, and, aided by extrinsic evidence, may correct the description. p. 110.

Complaint.—Sufficiency.—Initial Attack on Appeal.—A complaint, as against an attack made for the first time after judgment, is sufficient if it states facts sufficient to bar another action on the same cause and does not wholly omit any essential facts. p. 111.

MECHANICS' LIENS.—Foreclosure.—Parties.—Complaint.—In an action to foreclose a mechanics' lien for labor in the erection of a house, one who had a contract with the owner for the erection of the property, and under whose direction the house was erected, was a proper party defendant, and a complaint which sought to make him a party to answer to his interest will be sufficient as against initial attack on appeal to sustain a foreclosure against him. p. 111.

Huntington Circuit Court; *Samuel E. Cook*, Judge.

James L. Robbins against Frank Hillyard and
from a judgment for plaintiff, the defendants
affirmed.

Bowers and Milo Feightner, for appellants.

Starkins and Charles A. Butler, for appellee.

J.—This is a suit by appellee against appellants to enforce a mechanic's lien. The complaint in substance charges that appellant, McEnderfer, was and still is the owner of certain lots in Cottage Grove Addition of Huntington; that by mistake the lot on which a house was built for which the lien is asked was described as lot 31, but the house was actually built on lot 32. Appellants and appellee entered into a contract by which appellee agreed to furnish labor in the erection of a house on said real estate; that in compliance with the contract, he furnished labor of the value of \$39.25;

that notice of the lien was duly filed and recorded within the time prescribed by the law; that there is due appellee the sum of \$39.25 and \$15 attorney's fees, all of which is unpaid. Prayer for judgment against both appellants; that the description of the lot in the notice of the lien be reformed and corrected and for a foreclosure of said lien, and a sale of the property to pay the amount due appellee. A copy of the notice of the lien and a bill of particulars were filed as exhibits and made a part of the complaint.

Upon request the court made a special finding of facts and stated its conclusions of law thereon. The court found that appellee built a house upon the real estate of appellant, McEnderfer, and that appellant, Hillyard has a contract for a deed for such property when he pays for the house and lot; that the house was actually built upon lot 32 and that by oversight and inadvertence the lien therefor was filed on lots 30 and 31; that both appellants knew when the house was built, that it stood on lot 32 and that it was the only house constructed by appellee for appellants. The court also found that the original plan by which the house was to be erected was abandoned and that at the instance of appellants a house of different dimensions was erected by appellee and that extra material and labor furnished by appellee in so doing, was of the value of \$39.25, and, that he was entitled to \$15 attorney's fees. The court's conclusions of law were in favor of appellee and judgment was rendered accordingly for \$54.25 and foreclosure of the lien.

Appellants have separately assigned error: (1) In overruling the motion for new trial; (2) in each conclusion of law; (3) that the court erred in permitting appellee to amend his complaint at the close of the evidence. Appellant, Hillyard, has also assigned as separate error, that the complaint does not state facts sufficient to constitute a cause of action against him. The only errors argued and relied on for reversal are: The overruling of the motion for a new

trial on the ground that there is no evidence to support the finding and judgment of the court; in permitting the amendment of the complaint, and the alleged insufficiency of the complaint. Appellee insists that appellants have not complied with the rules of this court in setting out the evidence,

but supplies some omissions. Our examination of the

1. evidence so presented, convinces us that there is some evidence from which the court might find facts sufficient to support the judgment of foreclosure against both appellants, and under the well-recognized rule of this court, the judgment will not be reversed where this appears.

The question of error in permitting the amendment of the complaint by inserting lot 32, is urged by appellants. The

notice filed, is directed to appellant, McEnderfer, and

2. all others concerned, and states an intention to hold a lien on lots 30 and 31 in Cottage Grove Addition to the city of Huntington, Indiana, and upon the dwelling house recently erected thereon by appellee, for the sum of \$39.25, for labor done and material furnished in the erection of said house, within sixty days last past. The statute (Acts 1889 p. 257, §8297 Burns 1908), requires the person desiring to hold such lien to file a notice of his intention so to do "giving a substantial description of such lot or land on which the house, * * * may stand * * *. Any description of the lot or land in a notice of a lien will be sufficient if, from such description, or any reference therein, the lot or land can be identified." Our statute, §§400-403 Burns 1908, §§391-394 R. S. 1881, makes ample provision for amendment of pleadings and under the decisions, the trial court is given wide discretion in so doing, and unless it appears that the party complaining was prejudiced, misled, or deprived of some right or defense, the action of the trial court in permitting amendments, even after the evidence is in, will not be reviewed on appeal. *Raymond v. Wathen* (1895), 142 Ind. 367, 372, 41 N. E. 815; *Citizens St. R. Co. v. Heath*

(1902), 29 Ind. App. 395, 399, 62 N. E. 107. In the case at bar there is no showing that any of the parties were in any way surprised, prejudiced or deprived of any right by the amendment of the complaint. There are numerous

3. decisions to the effect that a defective description, may, under the present statute, be so amended as to make it good if the lien contains any reference, which, aided by extrinsic evidence may correct the descriptions. It has been expressly held that where the notice refers to a dwelling house, the identification of the building may be used as a means of correcting the description and of showing that no other property answers the description. This is especially applicable, where, as in this case, the court finds from the evidence, that the particular building in question was erected under the direction of both appellants who knew the particular lot upon which it stood, and further that the misdescription did not mislead either of appellants. *McNamee v. Rauck* (1891), 128 Ind. 59, 63, 64, 27 N. E. 423; *Smith v. Newbauer* (1896), 144 Ind. 95, 100, 42 N. E. 40, 42 N. E. 1094, 33 L. R. A. 685. Appellant, Hillyard, also complains of the insufficiency of the complaint which is attacked for the first time in this court. The rule is well settled that

4. where a complaint is first attacked after judgment, it is sufficient if it states facts sufficient to bar another suit for the same cause of action and does not wholly omit any essential averment. Appellant, Hillyard,

5. was a party defendant and the court found that he had a contract to purchase the property and that the house was built under his direction. It was proper to make him a party to the suit to answer to his interest, and the complaint was at least sufficient for that purpose. Being sufficient for such purpose, it may now be considered as aided by the finding of the court, and is sufficient to sustain the judgment rendered against appellant, Hillyard. *Oliver Typewriter Co. v. Vance* (1911), 48 Ind. App. 21, 95 N. E.

327; *Lavene v. Jarnecke* (1902), 28 Ind. App. 221, 227, 62 N. E. 510; *Consolidated Stone Co. v. Morgan* (1903), 160 Ind. 241, 245, 66 N. E. 696.

The record shows no available error. Judgment affirmed.

NOTE.—Reported in 101 N. E. 341. See, also, under (1) 3 Cyc. 300; (2) 27 Cyc. 401; (3) 27 Cyc. 206; (4) 81 Cyc. 771; (5) 27 Cyc. 349, 374.

BULLOCK v. CLARKE, RECEIVER, ET AL.

[No. 8,495. Filed March 25, 1913.]

1. **RECEIVERS.—Appointment.—Authority.—Employment of Attorney.**—A receiver appointed to take charge of and hold all money and bonds arising out of the assessment for certain street improvement, until a determination could be had of the rights of various claimants to the same, was merely a custodian of the funds and had no power to employ an attorney, or to incur expense in any other manner, where the order of appointment directed that he should file an inventory, and that he should do no other act as such receiver pending the final judgment and until otherwise ordered by the court. p. 114.
2. **RECEIVERS.—Employment of Attorneys.—Discretion of Court.**—The necessity of permitting attorneys to assist a receiver in protecting the funds and property in his hands for the benefit of all persons interested, and the amount of allowance that should be made out of the trust estate for such services, are within the discretion of the trial court, and its determination will not be disturbed on appeal unless there is manifest error. p. 115.
3. **RECEIVERS.—Attorneys.—Right to Compensation from Trust Estate.**—In an action by a contractor against several claimants to money and bonds arising from the assessments for a street improvement constructed by plaintiff, to recover a balance alleged to be due him under the contract, where the court appointed a receiver to take charge of the money and bonds and to hold same pending the final judgment in the cause, and it was finally adjudged that plaintiff was not entitled to any of such money or bonds, the attorney for the plaintiff, who was not employed by and rendered no services for the receiver, was not entitled to compensation out of the funds held by the receiver, even on the theory that his services were beneficial in preventing a dissipation of the funds. p. 115.

From Superior Court of Marion County (21,462); *Charles J. Orbison*, Judge.

Bullock v. Clarke—53 Ind. App. 112.

Petition by Henry W. Bullock against Charles B. Clarke, receiver, and others, for an allowance for attorney fees to be paid out of funds in the hands of the receiver. From a judgment refusing the allowance, the petitioner appeals. *Affirmed.*

Henry W. Bullock, for appellant.

Major A. Downing, for appellees.

IBACH, C. J.—On August 30, 1910, John E. Sullivan filed in the Marion Superior Court this cause of action against the Title Guaranty and Surety Company, the controller of the city of Indianapolis, and a number of other defendants. In his complaint he claimed to have entered into a contract with the city of Indianapolis for the improvement of certain of its streets and that there was still owing to him the sum of \$2,000 out of the fund derived from assessments against the abutting property affected by the improvement. Appellee, Title Guaranty and Surety Company, was his bondsman in the performance of the work for the city, and it also claimed an interest in the same fund. It was also averred that appellee, David F. Smith, had taken an assignment of the assessment rolls as security for sums of money advanced by him to said Sullivan to be used in the purchase of material, and for the payment of labor. A part of the prayer was that plaintiff may have judgment, and “that a receiver be appointed for the funds and bonds to arise from the improvement and for an injunction against the city officials from paying over any money to either the surety or assignee.”

The court appointed a receiver on November 18, 1910, and ordered him “to take charge of and hold” all money and street improvement bonds arising out of the assessment roll for said improvement, that he shall within ten days file an inventory of all money and bonds coming into his possession,

and "shall do no other act or acts as such receiver in this cause or in connection with said personal property, pending the final judgment of this court in this cause and until the court shall otherwise order."

Appellant does not claim that he prepared and filed Sullivan's complaint and procured the appointment of the receiver. But afterward, on June 29, 1912, when the original suit came on for trial, appellant was employed by and appeared for Sullivan and acted as his attorney in the prosecution of his claim of \$2,000 and the surety company and the assignee, Smith, were likewise represented by their attorneys. At this trial the decree of the court was that Sullivan take nothing by his action and that the sum of money and bonds held by the receiver be paid to the surety company and assignee. Sullivan filed his motion for new trial, and prayed an appeal to this court, which was not perfected. On the same day the motion for new trial was overruled, appellant filed his petition in the cause, wherein he asked the court to allow him \$1,000 attorney's fees and that such fees should be taxed as a part of the costs of the receivership. A hearing was had on this petition and judgment was entered denying the request of the petitioner. This appeal presents the question of the correctness of the court's ruling in denying such petition. It will be observed that the inter-

1. locutory decree or order appointing the receiver, the material portions of which we have heretofore set out, limits and restricts the power of such receiver to very narrow bounds. By such order he became merely a custodian of the money and bonds then in the hands of the officers of the city. Under such an order he could not employ an attorney or perform legally any act pertaining to the trust estate beyond the power granted to him by the order of appointment. *Herrick v. Miller* (1890), 123 Ind. 304, 307, 24 N. E. 111. The order did not authorize him to incur any

expense either in employing an attorney or in any other manner, and the fact was developed by the testimony of appellant that he was never employed by the receiver to perform any service connected with the receivership.

Appellant insists, however, that his services resulted in saving the fund from being dissipated and, therefore, his fees should be charged against the trust property.

2. We recognize the rule to be that the necessity of permitting attorneys to assist a receiver in protecting the funds and property in his hands for the benefit of all parties interested therein and the amount of the allowance out of the trust estate for such services is largely within the discretion of the trial court, and its determination of that matter will not be disturbed unless there is manifest error, but we cannot agree with appellant in the insistence that the trial court abused that discretion in this case. The receiver did not employ appellant; appellant's client,

3. as it was found by the court, had no interest whatever in the trust estate; the only parties who were entitled to these properties were represented by their own attorneys; and the only services performed in protecting the fund and saving it for the rightful owners were rendered by them, and not by appellant. His services were rendered solely for his client Sullivan, and tended rather to reduce the fund to be distributed to the proper owners than to preserve it. The facts show that as far as the duties of the receiver were concerned, he needed no assistance, for the court had very fully protected the funds in his hands by the order appointing him. Nothing was left to be done except for the court to ascertain who were the parties entitled to such funds, the separate attorneys, including appellant, representing the several claimants were in no sense representing the receiver, and under the facts of this case the fees of such attorney are not chargeable against the funds held in trust for those rightfully entitled to them. See *Bar-*

Wabash R. Co. v. McNown—53 Ind. App. 116.

tholomew v. Union Trust Co. (1905), 36 Ind. App. 328, 329, 75 N. E. 31.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 311. See, also, under (1) 34 Cyc. 290, 291; (2) 34 Cyc. 466; (3) 34 Cyc. 290, 364. As to the nature in law of a receiver's possession, see note to *American, etc., Bank v. McGettigan* (Ind.), 71 Am. St. 352.

THE WABASH RAILROAD COMPANY v. McNOWN, ADMINISTRATOR.

[No. 7,688. Filed June 27, 1912. Rehearing denied January 10, 1913. Transfer denied March 25, 1913.]

1. RAILROADS. — *Operation. — Speed. — Negligence.*—Although the running of a train at thirty-five or forty miles an hour through a town or city in violation of an ordinance is negligence *per se*, in the absence of a statute or ordinance the question of whether the operation of a train at such speed is negligence depends upon the conditions, situation and circumstances in each particular case. p. 123.
2. RAILROADS. — *Crossing Accidents. — Speed. — Negligence. — Complaint.*—In an action to recover for the death of plaintiff's decedent in a crossing accident, where the complaint showed that the crossing was on the main street of a town, that the view of an approaching train was obstructed and that the company had for some time permitted an electric gong at the crossing to remain out of repair so that it constantly sounded without regard to whether a train was in fact approaching, and thus obstructed the sound of approaching trains, that the defendant railroad company knew the conditions and that the colliding train approached the crossing at a speed of thirty-five or forty miles per hour, the negligence of defendant in the operation of its train at such speed, was sufficiently shown, even in the absence of an ordinance of the town regulating the speed of trains. p. 124.
3. RAILROADS.—*Operation. — Gongs at Crossings. — Negligence.*—In the absence of a law imposing the duty on railroads to maintain electric gongs at crossings to sound the approach of trains, the failure of a railroad company so to do is not actionable negligence; but, if such gong is installed, the company's act in permitting it to become defective so as to sound continually without regard to the approach of a train, and thus destroy or partially

destroy the efficacy of other signals which the law makes necessary, is such negligence as will render the company liable for damages proximately caused thereby. p. 124.

4. RAILROADS.—*Crossing Accidents.—Proximate Cause.—Failure to Signal Approach of Train.—Knowledge That Train is Approaching.*—Where a traveler approaching a railroad crossing knows that a train is approaching and knows such fact in time to stop and avoid injury, the failure of those in charge of the train to signal its approach to the crossing cannot be treated as the proximate cause of the injury. p. 125.
5. RAILROADS.—*Crossing Accidents.—Failure to Signal Approach of Train.—Proximate Cause.—Complaint.*—Where the complaint for death of a person in a railroad crossing accident alleged negligence in defendant's failure to signal the approach of the train to the crossing, other allegations showing that the driver of the vehicle, in which decedent was a passenger, knew that an electric gong maintained by defendant to sound the approach of trains to the crossing was out of repair so that it constantly sounded regardless of the approach of trains, and that the driver was told by the occupants of the vehicle and others that a train was approaching, will not justify the assumption that the driver knew that a train was approaching, where a view of the approaching train was obstructed and the sounding of the gong prevented such driver from hearing its approach, so as to preclude the holding that the alleged negligence of defendant was the proximate cause of the injury. p. 125.
6. RAILROADS.—*Failure to Signal Approach of Train to Crossing.—Negligence Per Se.—Complaint.*—The failure to give the signals required by statute of a train's approach to a crossing is negligence *per se*, and the averment of such failure in a complaint is a sufficient charge of negligence, unless its effect is lost by other controlling averments. p. 126.
7. APPEAL.—*Review.—Verdict.—Answers to Interrogatories.*—On appeal every presumption will be indulged in favor of the general verdict as against the jury's answers to interrogatories, and such verdict will not be overcome by such answers unless a conflict exists between them and the verdict that is irreconcilable on any theory, or on any supposable state of facts provable under the issues. p. 126.
8. RAILROADS.—*Crossing Accidents.—Verdict.—Answers to Interrogatories.*—In an action to recover for a death in a railroad crossing accident, answers to interrogatories showing that the driver of the hack in which decedent was riding learned of the approach of the train as he approached the crossing, that there was nothing that would have prevented him from stopping his team or turning it away from the track in time to avoid injury, that before driv-

ing on to the track decedent indicated to the driver that the train was approaching and requested him to stop before driving on to the track, that the hack cleared the track in front of the train without being struck, but that decedent was thrown out, or in some other manner escaped from the rear of the hack, etc., and was injured, and that the train gave the statutory signals of its approach to the crossing, are not in irreconcilable conflict with a general verdict for plaintiff as showing contributory negligence on the part of the decedent. p. 127.

9. RAILROADS.—*Crossing Accidents.—Negligence of Driver of Vehicle.—Contributory Negligence.—Imputation.*—The negligence of the driver of a vehicle in crossing a track in front of an approaching train cannot be imputed to a passenger in such vehicle who was killed by a collision with the train. p. 129.
10. NEGLIGENCE.—*Contributory Negligence.—Answers to Interrogatories.*—It is only where the facts found by the jury lead to but one inference, that the court will say as a matter of law that the injured party was guilty of contributory negligence. p. 129.
11. RAILROADS.—*Crossing Accidents.—Answers to Interrogatories.—Conflict With Complaint.*—In an action against a railroad company for the death of an occupant of a hack by collision with defendant's train at a crossing, answers by the jury to interrogatories showing that the train did not collide with the horses or the vehicle, that neither the driver, horses, nor vehicle were injured, and that after the hack had cleared the track the decedent was thrown or in some other way escaped, from the hack and fell so as to come in contact with the train whereby she received injuries causing her death, were not at variance with the allegations of the complaint that as the wheels of the hack struck the rails of the railroad the decedent was thrown or caused to fall from said hack upon the railroad, and that the approaching train ran against or over her body and inflicted injuries from which she immediately died. p. 129.
12. RAILROADS.—*Crossing Accident.—Proximate Cause.—Concurrent Negligence of Driver of Carriage.*—Where a train approaching at an excessive speed was invisible because of obstructions to the view, and the giving of the usual crossing signals could not be heard because of the constant sound of a defective electric gong which defendant maintained at the crossing, the act of a hack driver, who knew of the defective gong and that it constantly sounded regardless of the approach of trains, in crossing the track in front of the train in the face of warnings from persons near by, which he supposed were based on the sounding of the gong, cannot be held the sole proximate cause of a collision in which his passenger was killed, so as to relieve the railroad

- company from liability for its negligence in the manner of operating the train and in maintaining the defective gong. p. 130.
13. **NEGLIGENCE.—*Intervening Negligence.***—The concurring negligence of a third person is not sufficient, alone, to relieve from liability one whose negligence was the proximate cause of the injury. p. 132.
14. **APPEAL.—*Review.—Verdict.—Answers to Interrogatories.***—For the purpose of determining the question raised on a motion for judgment on the jury's answers to interrogatories, the averments of the complaint will be assumed as proven. p. 132.
15. **NEGLIGENCE.—*Joint Negligence.***—Where two or more joint tort feorsors are guilty of negligence proximately contributing to an injury, either or all of such joint tort feorsors may be required to respond in damages therefor, if the other elements of liability are shown. p. 132.
16. **RAILROADS.—*Crossing Accidents.—Verdict.—Answers to Interrogatories.***—Where the complaint in an action against a railroad company for the death of plaintiff's decedent in a crossing accident alleged negligence in failing to give the statutory signals of the approach of the train to the crossing, a verdict for plaintiff is a finding that such signals were not given, and is not overcome by answers to interrogatories showing that the whistle was sounded and that the bell was rung, but not showing that the same was done as provided by the statute. p. 133.
17. **RAILROADS.—*Operation.—Crossing Signals.***—Crossing signals given only at a time when the train is so near the crossing as to render such signals unavailable as notice, do not serve the purpose intended by statute and will not relieve the company from liability. p. 134.
18. **PLEADING.—*Complaint.—Construction.***—The rule requiring the court, in case of doubt upon the pleading, to construe the same most strongly against the pleader and to indulge against its validity all reasonable inferences not excluded by positive and direct averment, when applied to the construction of a complaint, is applicable to only such averments as are necessary to state the cause of action. p. 134.
19. **PLEADING.—*Complaint.—Sufficiency.—Inferences of Defense.***—Where all the essential averments of a cause of action are directly and positively stated, the mere inference of a defense to the action, suggested by any of the averments contained therein, will not render the complaint subject to demurrer. p. 135.
20. **NEGLIGENCE.—*Contributory Negligence.—Complaint.***—Contributory negligence, being a defense, need not be negatived in the complaint. p. 135.
21. **RAILROADS.—*Crossing Accidents.—Liability.—Contributory Negligence of Driver of Vehicle.***—The contributory negligence of a

back driver in crossing a track in front of an approaching train, will not relieve the railroad company from liability for its negligence resulting in the killing of a passenger in such back. p. 135.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Charles S. McNown, administrator of the estate of Luella B. McNown, deceased, against The Wabash Railroad Company and others. From a judgment for plaintiff, the defendant railroad company appeals. *Affirmed*.

Stuart, Hammond & Simms, Allison E. Stuart and J. Fred Vance, for appellant.

Lesh & Lesh, for appellee.

HOTTEL, C. J.—Action against appellant, Timothy Mills and Viola Mills to recover damages for the death of appellee's decedent alleged to have resulted from the negligence of appellant and said Mills and Mills. The injury to decedent from which her death resulted occurred at a street crossing of appellant's railroad at the town of Andrews, Indiana. The issues of fact were tendered by a complaint and a general denial thereto. There was a trial by jury resulting in a verdict of \$1,000 for appellee against appellant and Timothy L. Mills with which were filed answers to interrogatories. From a judgment on the verdict appellant alone prayed and perfected a term-time appeal. Appellant's demurrer to the complaint was overruled as was also its separate motion for judgment on the answers to interrogatories. These rulings, exceptions to which were properly saved, present the only errors assigned and relied upon by appellant.

In view of the questions presented, especially by the motion for judgment on the answers to the interrogatories, all of the essential averments of the complaint upon which proof might have been introduced, are important, and we, therefore, set out the averments or the substance of such as are necessary to an understanding of such questions. The complaint alleges in detail the facts with reference to appellant being a corporation and operating its railroad

through said town of Andrews and across the public street thereof at the crossing where appellee's decedent was killed, and also the facts with reference to said Mills and Mills being engaged in the business of a common carrier carrying persons and baggage for hire by hack, drawn by horses over and upon the main street of said town which crossed appellant's said railroad track, and that on the day appellee's decedent, Luella B. McNown, was killed she had taken passage on said hack from her home south of said railroad track to the interurban station north thereof. Said complaint then proceeds in substance as follows (we italicise parts italicised by appellant in its brief): "that said hack was at said time being driven by * * * William Bowls, * * * the agent and employe of the defendants Mills and Mills; that as the hack on which the said Luella was riding was about to cross said railroad in making the trip to said interurban station, *and while she was a passenger thereon as aforesaid, a train approached from the east at a high speed, and the driver of said hack whipped or otherwise caused the horses hitched thereto and which were drawing the same to plunge forward in order to cross said railroad before the arrival of said train, and as the wheels of the carriage struck the rails of said railroad said Luella B. McNown was thereby thrown or caused to fall from said hack upon said railroad and said approaching train thereupon ran on, against and over her body and inflicted injuries from which she immediately died; * * * that the injuries and death of said Luella was caused by the gross negligence of the defendants, which negligent conduct and acts were as follows:*" Here follow averments showing that the view of a train approaching from the east was so completely obstructed as to prevent the traveler approaching the crossing from the south from seeing the same until he "*would almost enter upon the right of way of said railroad;*" and "*until a team approaching from the south would get so near the main track of said railroad that it would be difficult and dangerous to undertake*

to turn the team and vehicle and avoid a collision by waiting until after the passage of the approaching train to make the crossing."

The use by appellant for some time prior to appellee's death of an electric bell or gong at said crossing to warn travelers of the approach of trains and the manner, character and purpose of such gong is alleged in detail after which it is averred: that for several days prior to said June 27, 1908, and on said day up to and including the time of said accident, said electric gong or bell had been out of order and repair and was suffered to become and remain out of repair to such an extent and in such a manner that said bell or gong sounded continuously without regard to whether there was or was not a train approaching said crossing; that on said day said gong or bell rang continuously; that the hack driver knew of the condition of said electric bell and for this reason was inattentive to its ringing as said hack approached, and the noise of said gong or bell obstructed the sound of the coming train, such as usually attends the operation of trains; that said train consisting of a locomotive and 25 or 30 freight cars was being operated "at a dangerous rate of speed, to wit from 35 to 40 miles per hour." Knowledge by appellant of all the conditions present at said crossing including character and frequency of travel over same, obstructions to view, the defective condition of the electric bell and its interference with hearing an approaching train, is averred with particularity. Then follow averments of negligence on the part of Mills and Mills as follows: "*that their agent and employe as he approached said railroad just prior to said accident heard said gong or bell but paid no heed to it; that passengers in said hack who also heard said gong or bell called to him that a train was approaching, but he paid no heed to such warning, and bystanders by the side of the street called that a train was coming, but on account of the noise of said bell or gong he did not hear or heed such calls until too late;*" that said

approaching train did not as required by law give the usual signal by whistle at a point from 80 to 100 rods eastward of said crossing, and did not continuously cause the bell to ring from said point until after the passing of said highway crossing; that it was operating said train at a rate of speed which was dangerous and negligent and said injuries and death of said decedent were wholly caused by the joint negligence of the several defendants hereto as aforesaid.

In discussing the sufficiency of the complaint appellant insists: (1) That the running of appellant's train at a speed of 35 or 40 miles an hour as alleged, was not, in the absence of an ordinance prohibiting such speed, negligent. (2) That there is no law requiring a railroad company to construct or maintain an electric bell or gong at a railroad crossing and that, therefore, the failure to maintain or keep such bell does not constitute negligence. (3) That the failure to give the statutory signals could not be the proximate cause of the death of appellee's decedent because the driver of the hack had notice of the approach of said train before attempting to cross the track. (4) That for said reasons no actionable negligence is charged against appellant.

It is true as appellant contends that the running
1. of a train at thirty-five or forty miles an hour in the absence of an ordinance or statute prohibiting such speed, does not *necessarily* constitute negligence. The running of a train at such speed through a town or city in violation of an ordinance would be negligence *per se*. *Pennsylvania Co. v. Horton* (1892), 132 Ind. 189, 31 N. E. 45; *Louisville, etc., R. Co. v. Davis* (1893), 7 Ind. App. 222, 33 N. E. 451; *Shirk v. Wabash R. Co.* (1896), 14 Ind. App. 126, 42 N. E. 656. But, in the absence of an ordinance governing the same, whether the running of a train at a given rate of speed alleged to be negligent, in fact constitutes negligence on the part of such railroad company depends upon the conditions, situation and circumstances averred in each particular case. *Chicago, etc., R. Co. v. Spilker* (1893), 134 Ind.

280, 34 N. E. 218; 1 Elliott, Roads and ; *Lafayette, etc., R. Co. v. Adams Thompson v. New York Cent., etc., R. Y.* 636, 17 N. E. 690; *Louisville, etc., R.* 108 Ind. 551, 9 N. E. 476. Under these we think the averments of the complaint showing the place, conditions, surroundings and frequency of the use of the crossing that the rate of speed alleged to have in fact negligent. We are not unmindful of the case of *Lake Shore, etc., R. Co. v.* Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) appellant. In fact we think our conclusion of this charge of the complaint is correct. We quote from that case at page 108: "In towns the conditions are generally different. The crossings are at short intervals, and the houses are close together and up to the line of the railroad. They obstruct the view of an approaching train, and there are no warning signals, and, in consequence, the crossing is often misleading and difficult, if not dangerous, for those upon the crossing to see an approaching train. This most excellent legislative warrant for restricting the speed of trains in the corporate limits of cities and towns does not apply to country."'

In the contention of appellant it must be admitted that as no law that imposed upon appellant, in this instance, the duty of maintaining an electric gong at the crossing involved, and a failure to maintain such gong at such crossing would constitute liable negligence. We do not think, however, that it follows from this admission that it is the duty to maintain and keep a defective gong which would give false alarm that was liable to and which,

under the averments of the pleading in question, did in fact interfere with and prevent or in a measure prevent the efficacy of other signals which the law made necessary. Though not required to keep or maintain such electric bell, yet appellant having voluntarily kept and maintained the same, at said crossing in question, the traveling public had a right to rely upon it to the extent of presuming that it would correctly indicate the danger or serve the warning which it was intended that it should give. *Pennsylvania Co. v. Stegemeier* (1889), 118 Ind. 305, 20 N. E. 843, 10 Am. St. 136; *Cleveland, etc., R. Co. v. Heine* (1902), 28 Ind. App. 163, 62 N. E. 455; *Cleveland, etc., R. Co. v. Coffman* (1903), 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179, and authorities cited.

As to appellant's third contention, it may be conceded that the object of the law in requiring the statutory signals to be given, is to notify travelers on the highway of the

4. approaching train. It follows therefore that if the traveler approaching the crossing knows that a train is approaching and knows such fact in time to stop before crossing and avoid collision or injury, the failure to give such signals should not be treated as the proximate cause of the injury. *Baltimore, etc., R. Co. v. Abegglen* (1908), 41 Ind. App. 603, 607, 84 N. E. 566; *Korrady v. Lake Shore, etc., R. Co.* (1892), 131 Ind. 261, 263, 264, 29 N. E. 1069; *Baltimore, etc., R. Co. v. Musgrave* (1900), 24 Ind. App. 295, 301, 55 N. E. 496; *Indiana, etc., R. Co. v. Hammock* (1887), 113 Ind. 1, 4, 14 N. E. 737. The error in appellant's

5. position, upon this ground of the negligence charged against it, as we see it, is not in the propositions of law relied upon, but is in the assumption that the facts averred show that the driver of the hack knew that there was a train approaching in time to have stopped his team before crossing the track. We do not think the facts alleged justify this assumption. The facts alleged do show that the hack driver was told by the occupants of the hack and by

others that a train was coming, but not that he actually knew that such train was coming. On the contrary, the facts pleaded show that the driver disregarded and treated the warning given by the decedent and others, of the approaching train, because he thought they were induced by the gong which he knew had been continually giving a false alarm, the noise of which, according to the averments of the complaint, prevented said driver from hearing the approach of said train. These averments may tend and in fact do emphasize the negligence of the driver of the hack, and if the question were one involving liability for his injuries, or that of the property of the hack owner, a very different and much easier question would be presented.

The failure to give the signals required by statute of a train's approach, is negligence *per se*, and the averments in this complaint of such failure is of itself sufficient

6. to charge negligence on the part of appellant unless such averment is so controlled or modified by other averments as to lose its force and effect. *Cleveland, etc., R. Co. v. Miles* (1904), 162 Ind. 646, 70 N. E. 985; *Pennsylvania Co. v. Fertig* (1905), 34 Ind. App. 459, 70 N. E. 834; *Pittsburgh, etc., R. Co. v. Burton* (1894), 139 Ind. 357, 37 N. E. 150, 38 N. E. 594. We do not think the other averments of the complaint in fact show that appellant actually knew of the approach of the train *in time to have avoided the collision*. For the reasons indicated, we are convinced that the averments of the complaint were sufficient to withstand the demurrer.

A more serious question, however, arises on the ruling on the motion for judgment on the answers to interrogatories.

But upon this question the appellee has the advantage

7. which requires this court to indulge every presumption in favor of the general verdict and which prevents its overthrow unless this court finds the conflict between such answers and such general verdict to be of such a character as to be irreconcilable on any theory, or upon

any supposable state of facts provable under the issues. *McCoy v. Kokomo R., etc., Co.* (1902), 158 Ind. 662, 64 N. E. 92; *Flutter v. New York, etc., R. Co.* (1901), 27 Ind. App. 511, 59 N. E. 337; *Pittsburgh, etc., R. Co. v. Lighthouse* (1907), 168 Ind. 438, 78 N. E. 1033; *Indianapolis, etc., R. Co. v. Emmerson* (1913), 52 Ind. App. 403, 98 N. E. 895; *Southern R. Co. v. Utz* (1913), 52 Ind. App. 270, 98 N. E. 375.

The particular facts found by the answers to interrogatories upon which appellant specially relies for the overthrow of the general verdict are in substance as

8. follows: The driver of said hack with said decedent crossed said main track with his horses in a trot in front of said train as said train was approaching from the east. About the time said driver entered upon or was about to enter upon said track he checked his horses, as though he was going to stop, and without bringing them to a stop, whipped them rapidly over said main track, clearing the track with said hack and avoiding any collision with either horses or vehicle. Before crossing over said track said driver learned from others of the approach of said train. There was nothing that would have prevented him from stopping his team, or turning his horses to the right or left before driving on said main track in time to have avoided collision with said train. The train as it approached the crossing was running at a speed of 25 miles an hour. Before driving on the main track decedent indicated to the driver that the train was approaching and desired him to stop before driving on the track. Said decedent, as said hack approached said main track occupied one of said seats towards the front end of said hack. "No. 21. Just after passing over said track and while said horses and hack were moving rapidly to the north did said decedent by some means get out or was she thrown out through the door in the rear end of said hack? A. Yes. No. 22. In so escaping from said hack did said decedent fall so that her head or some portion of her body

came in contact with said train, the engine of which by that time had arrived at a point where said hack had crossed over said track? In such fall and in said contract with said train did said decedent receive injuries which caused her death? A. Yes. * * * No. 36. As said train approached said crossing from the east, did it give the whistle signals for said crossing? A. Yes. No. 37. As said train approached said crossing did it give the station signal for the station in Andrews? A. Yes. No. 38. As said train approached said crossing was the bell on said engine ringing? A. Yes." It should be remarked in this connection that we have quoted from appellant's interrogatories alone, and only such as present most favorably appellant's contention. Many others propounded by both appellant and appellee, were answered, some of which are apparently in conflict with those quoted. By one of its answers, the jury found that the driver of said hack, did not learn of the approach of said train before driving on the track in time to have stopped until the same passed over the crossing.

It is insisted: (1) That the answers to the interrogatories eliminate the negligence charged in the complaint of failure to give the statutory signals, and speed of the train, and that the appellant was not therefore guilty of any negligence. (2) That the answers show that decedent was guilty of contributory negligence. (3) That there is a variance between the averments of the complaint and the answers to interrogatories in that the jury by its said answers found that the decedent was not killed by collision with the train while on the track as alleged in the complaint, but that "she had passed over the track safely", and was thrown out of the hack by the speedy driving thereof and "in her fall struck the engine which at that time was passing the point on the crossing over which the hack had safely passed."

Taking up out of order the above reasons urged by appellant as sustaining its position that the court erred in overruling said motion, we submit that we find nothing in the

answers to the interrogatories from which this court can say as a matter of law that the decedent was guilty of contributory negligence. In this connection it must be re-

9. membered that the negligence of the driver of the hack could be, in no event, charged against the decedent. This is conceded by appellant and settled by authority, and would be so, even though the decedent had been driven in a vehicle of a relative or friend, and not by one occupying toward her the relation of a common carrier. *Miller v. Louisville, etc., R. Co.* (1891), 128 Ind. 97, 27 N. E. 339, 25 Am. St. 416; *Chicago, etc., R. Co. v. Spilker, supra*, and authorities cited; *Lake Shore, etc., R. Co. v. Boyts* (1897), 16 Ind. App. 640, 45 N. E. 812; *Aurelius v. Lake Erie, etc., R. Co.* (1898), 19 Ind. App. 584, 49 N. E. 857; *Indiana Cent. R. Co. v. Hudelson* (1859), 13 Ind. 325, 74

Am. Dec. 254. It is only where the facts found by the 10. jury lead to but one inference, that this court will say as a matter of law that the injured party was guilty of contributory negligence. *Baltimore, etc., R. Co. v. Walborn* (1891), 127 Ind. 142, 147, 150, 26 N. E. 207. The jury in this case expressly found that the decedent indicated to the driver of the hack before he went upon the track, that the train was approaching, "and desired him to stop." She could scarcely have done more. In any event this finding is enough to prevent this court from saying that the facts found necessarily show the decedent guilty of contributory negligence.

In our opinion there is little merit in appellant's contention that there is a material variance between the facts found and the averments of the complaint as to the manner 11. in which decedent received the injury that resulted in her death. The averments of the complaint in this regard are: "As the wheels of the carriage struck the rails of said railroad said Luella B. was *thereby thrown or caused to fall* from said hack upon said railroad, and said approach-

ing train thereby ran on, *against* or over her body and inflicted injuries from which she immediately died." The particular interrogatories and answers thereto upon which appellant bases its contention are those which find in effect that the train did not collide with said horses or with said vehicle; that neither the driver, horses nor vehicle were injured, and the answers to interrogatories Nos. 21 and 22, *supra*. Interrogatory No. 21 is framed in the alternative so that the answer thereto makes it appear that the decedent either got out of the hack or was thrown out, but the jury in their answer to another interrogatory expressly find "that said hack had just cleared the railroad when decedent *was thrown* from the hack and thereupon struck by the aforesaid train causing injuries resulting in her death." The complaint does not aver that the train collided with the hack or that appellee was thrown on the rails of the track. It does aver that when thrown out "upon said *railroad* said approaching train ran on, against and over her body." These averments are sufficiently broad to admit proof that justified the answers to the interrogatories. To hold that there is such material or essential variance between the averments of the complaint and the answers to the interrogatories, as would require a reversal of the judgment below, would be a violation of both the letter and spirit of §§407, 700 Burns 1908, §§398, 658 R. S. 1881.

The most serious and troublesome question presented by appellant is its contention that the answers to interrogatories show that the statutory signals were given and that

12. this being true, the appellant could not be said to be guilty of any negligence which could be said to have in any way contributed to the death of appellee's decedent. Under the issues tendered by the complaint, the hack driver may have testified, and, for the purposes of the question being considered, this court can assume that he did testify in effect that he knew that the electric bell maintained at the crossing in question had been out of repair for several

days prior to, and up to, the time that the decedent was injured; that it was constantly ringing regardless of whether a train was approaching or not; that its ringing made considerable noise and prevented, or materially interfered with, one's hearing the approach of a train; that on the occasion in question when approaching the crossing he listened and heard no approaching train, but heard only the clatter or noise of the electric bell; that he looked, but, on account of the obstruction to his view, saw no approaching train; that the decedent and others warned him that a train was approaching, but he knew that they were relying upon such electric bell and for this reason he discredited and disregarded their warning; that on account of the noise made by such electric bell he failed to hear the approach of said train, and did not know of its approach until his horses were upon the track and it was too late to prevent collision except by going forward; that he then discovered that the nearness and speed of the oncoming train was such as required prompt and extraordinary action to avoid collision; that for this reason he whipped up his horses, and tried to clear the track; that he barely cleared the track with his horses and vehicle, but in doing so the horses, when he struck them, suddenly jerked the hack forward with greatly increased speed, and struck the rails of the track with such force that the decedent was thereby thrown backward and out of the door of the hack; that he would have heeded the warnings of decedent and others telling him of the approach of said train and stopped his hack until such train had passed but for the fact that he knew that such electric bell was out of repair and continually sounding a false alarm, and that he supposed such warnings were induced by and the result of their reliance upon the alarm given by such bell; that but for the excessive speed of the train he would have crossed the track in safety without whipping up his horses and giving his hack the sudden jerk which caused decedent to be thrown out and killed. Many of the facts above assumed were in effect found

by the answers to interrogatories submitted not quoted above. Such facts would by no means have justified the hack driver in his attempt to cross such track, or relieved him or his master from negligence proximately causing the death; but this is not the question which we are called upon to decide. On the contrary, assuming that such facts were proven, this court must determine whether the hack driver's negligence was the sole proximate cause of the death of appellee's decedent, and whether any act of negligence charged against appellant in any way contributed thereto. We do not believe that the assumed facts would justify such a conclusion, but, on the contrary, to our mind, they force the conviction that the hack driver's conduct and act in crossing said track at the time he did was in a measure, at least, influenced and controlled by the alleged negligent acts of the appellant.

Although the negligence of a third person concurs in

13. producing an injury, this alone will not relieve from liability another negligent party whose negligence was the proximate cause of such injury. *Miller v. Louisville, etc., R. Co., supra*; *Rogers v. Leyden* (1891), 127 Ind. 50, 53, 26 N. E. 210, and authorities cited.

In this case, under the averments of the complaint, which, for the purposes of this motion must be assumed as proven, the hack driver was the agent of appellant's codefend-

14. ants to the action below, the owners of the hack line, who were themselves common carriers for hire; and, where two or more joint tort feors are guilty of

15. negligence proximately contributing to an injury, either, or all of such joint tort feors may be required to respond in damages therefor, the other elements of liability being shown. *Cleveland, etc., R. Co. v. Gossett* (1909), 172 Ind. 525, 535, 87 N. E. 723; *Cleveland, etc., R. Co. v. Hilligoss* (1908), 171 Ind. 417, 423, 86 N. E. 485, 131 Am. St. 258; *Indianapolis Traction, etc., Co. v. Holtzclaw* (1907), 40 Ind. App. 311, 81 N. E. 1084; *Peru Heating Co*

v. *Lenhart* (1911), 48 Ind. App. 319, 95 N. E. 680, 682, and authorities there cited.

It is also insisted by appellee that the answers of the jury to the interrogatories are not equivalent to a finding that appellant when approaching the crossing in question gave the signal required by statute at the time and place and in the manner prescribed by such statute, and therefore is not necessarily inconsistent with the general verdict upon such question, which is a finding that such signals were not so given. The statute in question, §5431 Burns 1908, §4020 R. S. 1881, provides that all railroads operating in this State shall have attached to each and every locomotive engine a whistle and a bell and that in approaching a crossing where “such engine is not less than eighty nor more than one hundred rods from such crossing” the engineer or person in charge of such engine shall “sound the whistle on such engine distinctly three times and ring the bell attached to such engine continuously from the time of sounding such whistle until such engine shall have fully passed such crossing.” The general verdict upon the question under consideration was a finding that the whistle of appellant’s engine was not sounded *distinctly three times* when *not less than eighty and no more than one hundred rods from the crossing* in question, and that the bell did not continue to ring from the sounding of the whistle until the crossing was passed by such engine. The answers to interrogatories, *supra*, simply find that as appellant’s train approached said crossing, the whistle signal for the same was given. The number of the blasts, or where given, is not specially found. Likewise, said answers find that the bell on said engine was ringing as the train approached said crossing, but it is not found when or where it began ringing, or that it began ringing with the first blast of the whistle.

The statute fixes the time, place and manner of signals to be given as a warning to the traveling public of the approach

of a train at a public crossing over a highway, and it
17. has been held that such signals given only at a time
when so near the crossing as to be unavailable as
notice, does not serve the purpose intended by the statute
and will not relieve the company so giving such signals from
liability. *Chicago, etc., R. Co. v. Boggs* (1885), 101 Ind.
522, 51 Am. Rep. 761; *Baltimore, etc., R. Co. v. Young*
(1899), 153 Ind. 163, 54 N. E. 791.

We are not entirely free from doubt in our determination
of the question presented by the ruling on this motion, but,
taking the averments of the complaint upon the subject of
appellant's negligence in their entirety, we are constrained
to hold that proof might have been admitted thereunder,
sufficient to sustain the general verdict, notwithstanding the
answers to interrogatories and that the motion for judgment
on said answers was therefore properly overruled.

Judgment affirmed.

ON PETITION FOR REHEARING.

HOTTEL, J.—Appellant has filed a petition for rehearing
in this case and its counsel in the brief in support thereof
press upon us with such earnestness and sincerity their rea-
sons for believing that the court has committed error in its
original opinion, that we are led to give additional consid-
eration to some of the questions determined therein.

If this were an action by the hack driver, or, if his negli-
gence could be charged against appellee's decedent, or, if,
under the averments of the complaint or the answers to in-
terrogatories, the negligence of such driver could be said to
be the sole proximate cause of the death of the decedent, we
would be persuaded that appellant is right in its contention
that a rehearing should be granted. In our consid-

18. eration of the complaint we were not unmindful of
the rule so earnestly urged by appellant in its original
brief and now again emphasized which required us, in case

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of doubt upon the pleading, to construe the same most strongly against the pleader and to indulge against its validity all reasonable inferences not excluded by positive and direct averment. *Shenk v. Stahl* (1905), 35 Ind. App. 493, 498, 74 N. E. 538; *Wabash R. Co. v. Beedle* (1910), 173 Ind. 437, 445, 90 N. E. 760; *Pond v. Sweetser* (1882), 85 Ind. 144; *State, ex rel., v. Castell* (1887), 110 Ind. 174, 187, 11 N. E. 219; *Hays v. Hays* (1907), 40 Ind. App. 471, 473, 82 N. E. 90, and authorities cited. It should be remarked, however, in this connection, that this rule when applied to a complaint is applicable to only such averments as are necessary to state

the cause of action. When all the necessary and
19. essential averments of a cause of action are directly and positively stated, no *mere inferences of a defense* to such action suggested by any averments contained in such complaint will overcome or defeat the cause of action so stated and render the complaint subject to demurrer. *Cole v. Searfoss* (1912), 49 Ind. App. 334, 97 N. E. 345; *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822.

In this case it is urged that the complaint nowhere charges that the decedent or the driver of the hack was without fault, or that the decedent or the hackman did not see the train. Contributory negligence as appellant well un-

20. derstands, is now a defense and need not be negatived by the complaint. Granting that the appellant's contention that the hack driver could have seen, and, in fact, did see the train just before he attempted to cross the track, is correct, this would not show the decedent guilty of any contributory negligence but would only show the hack driver guilty of such negligence. The fact that the hack

21. driver's negligence cannot be attributed to the decedent, is well settled by the authorities cited in the original opinion. It is equally well settled that such negligence of the hack driver, if merely contributory, will not relieve appellant from liability for its negligence. It is clear

from the averments of this complaint that the negligent acts charged against appellant influenced the acts and conduct of the hack driver and caused him to do and act as he did, and under such circumstances his acts, though negligent and contributing to the proximate cause of the injuries resulting in the death of appellee's decedent, would not relieve appellant from liability but would only have the effect of making the other common carrier by whom such hack driver was employed and in whose hack such decedent was a passenger, also liable as a joint tortfeasor. What we have said in the discussion of the complaint is equally applicable to the question presented by the motion for judgment in appellant's favor on the answers to interrogatories.

The motion for rehearing is therefore overruled.

NOTE.—Reported in 99 N. E. 126; 100 N. E. 383. See, also, under (1) 33 Cyc. 971; (2) 33 Cyc. 1057; (3) 33 Cyc. 942; (4) 33 Cyc. 1045; (5) 33 Cyc. 1042, 1053; (6) 33 Cyc. 967, 1058; (7) 38 Cyc. 1928; (8, 16) 33 Cyc. 1142; (9) 33 Cyc. 984, 1015; (10) 29 Cyc. 634; (11) 33 Cyc. 1142; 38 Cyc. 1925; (12) 33 Cyc. 987; (13) 29 Cyc. 496; (14) 3 Cyc. 315, 316; (15) 29 Cyc. 487; 38 Cyc. 483; (17) 33 Cyc. 958; (18) 31 Cyc. 78; (19) 31 Cyc. 109, 288; (20) 29 Cyc. 575; (21) 33 Cyc. 1015. As to speed of train as evidence of negligence, see 53 Am. Rep. 52. As to the care a railroad company must exercise at highway crossings, see 44 Am. Rep. 470. As to imputing hack driver's negligence to the person inside, see 110 Am. St. 291; 8 L. R. A. (N. S.) 597. As to duty of highway traveler to keep open his eyes and ears at railroad crossings, see 90 Am. Dec. 780. As to joint and several liability in cases of concurrent negligence, see 16 Am. St. 250. For a discussion of the speed of a railroad train as negligence in the absence of a prohibitory statute, see 7 Ann. Cas. 988.

AMERICAN CAR AND FOUNDRY COMPANY v. FESS.

[No. 7,668. Filed March 26, 1913.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Tools.—Duty of Inspection.*—The master does not owe the duty of inspecting a hand tool while it is in the exclusive control and custody of his servant, where such tool is so simply constructed that a defect therein may be discovered without special skill or knowledge and

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without intricate inspection, nor is he chargeable with notice of any defect that could have been discovered had he made an inspection. p. 138.

2. **MASTER AND SERVANT.—Injuries to Servant.—Negligence of Fellow Servant.**—Where plaintiff was working with another employe who was using a hand hammer, weighing about two and one-half pounds, which had been furnished by defendant about two weeks before the injury and had been in the control of the user during that time, the plaintiff's injury, caused by the hammer flying from the handle and striking him, must be attributed solely to the negligence of a fellow servant, under a showing that defendant maintained a tool room, with men in charge whose business it was to repair tools which were returned as defective, and to which all employes were instructed to return all defective tools, and in the absence of evidence to show that the hammer was defective when delivered to the user, or that defendant had any knowledge that it had become defective. p. 139.

3. **MASTER AND SERVANT.—Injuries to Servant.—Liability.**—A master cannot be held to respond in damages for injuries to his servant in the absence of a showing that the master violated a legal duty. p. 139.

From Floyd Circuit Court; *Joseph H. Shea*, Special Judge.

Action by Thomas L. Fees against the American Car and Foundry Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

M. Z. Stannard and *Jonas G. Howard, Jr.*, for appellant.

George H. Hester and *Stotsenburg & Weathers*, for appellee.

LAIRY, J.—Appellee in this case recovered a judgment in the trial court for damages on account of personal injuries. The facts disclosed by the evidence show that appellee was employed by appellant to work in its car shops, and that at the time of his injury he was engaged with two fellow workmen in fastening rivets in the steel frame of a car which was in process of construction. It was the work of appellee to hold an iron bar known as a "dolly" against the heated rivet while it was hammered into place by another member of the gang called a "riveter," who used for that purpose

an air gun or hand hammer. The third member of the gang was a boy known as a "pick up boy" who heated the rivets and placed them in position. At the time the injury to appellee occurred, the riveter was using a hand hammer weighing about two and one-half pounds, with a handle about twenty-two inches in length. This hammer was loose upon the handle, and while the riveter was using it, suddenly left the handle and struck the plaintiff inflicting the injury of which he complains.

Appellant maintained a tool room in connection with its factory where it kept on hand a supply of hammers, hammer handles and such other tools and parts of tools as were required for use in the factory. It kept on duty in this tool room men whose business it was to repair tools which were returned as defective, and the employes in the factory were instructed to return all tools which became defective while in use to this tool room. When this was done the tool was repaired or another furnished in its place. The hammer which was in the hands of the riveter at the time the injury occurred, had been furnished to him from the tool room about two or three weeks before, and had remained in his possession until the time of the accident. When not in use it was placed in a tool box or locker which was under the control of the men who worked in this gang. There is no evidence tending to show that the tool was defective at the time of its delivery to the riveter by the appellant, and none tending to show that appellant had any actual knowledge that it had become defective by use or otherwise while in the possession of the riveter. The hammer was a hand tool of such simple construction that the defect which caused the injury could have been discovered without special skill or knowledge and without intricate inspection.

The master does not owe the duty of inspecting tools of this character while they are in the exclusive control
1. and custody of his servants. He can not, therefore, be held to have notice of all of such defects as

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would have been discovered by such inspection. If he had actual notice of the defect he might be held liable for an injury to a servant who had not assumed the risk, but he cannot be held liable to any of his servants upon constructive notice, for the reason that he is not negligent in failing to inspect under such circumstances. Under

2. the showing made in this case the injury to appellee was caused solely by and through the negligence of a fellow servant. The master was not shown to have

3. violated any legal duty and for that reason he cannot be held to respond in damages. The questions presented in this case, are fully considered in the case of the *American Car, etc., Co. v. Nachand* (1911), 47 Ind. App. 204, 93 N. E. 1083, to which reference is made for a more extended discussion. .

The trial court permitted a recovery upon the theory that appellant owed the duty to inspect the hammer while it was in the exclusive possession and control of the servant, and that he was chargeable with knowledge of such defects as would have been disclosed by such inspection. This appears from several of the instructions given, and also by the ruling of the court in refusing to give certain instructions tendered by appellant. For errors thus appearing a new trial should have been granted. Other questions presented need not be considered as they are not likely to arise upon a retrial of the case. Judgment reversed, with directions to grant a new trial.

Shea, J., not participating.

NOTE.—Reported in 101 N. E. 318. See, also, under (1) 26 Cyc. 1138; (2) 26 Cyc. 1276, 1332; (3) 26 Cyc. 1080. As to the extent of duty imposed on master in respect of tools furnished servant to work with, see note to *Brazil Block Coal Co. v. Gibson* (Ind.) 98 Am. St. 290; 1 L. R. A. (N. S.) 944. On the question of the liability of a master for injury from defect in simple tool, see 40 L. R. A. (N. S.) 832; 7 Ann. Cas. 342; Ann. Cas. 1912 A 1004.

FRICKE, TRUSTEE, v. ANGEMEIER ET AL.

[No. 7,872. Filed March 26, 1913.]

1. **CORPORATIONS.—Capital Stock.—Corporate Debts.—Preferences.—Stockholders.—Officers.**—The capital stock of a corporation is not a trust fund to be held intact for the benefit of creditors, and an insolvent corporation in the payment of its debts, may prefer directors and stockholders over other creditors. p.144.
2. **CORPORATIONS.—Dividends.—Debts Due Stockholders.**—A dividend is not a debt due a stockholder until it has been rightly declared. p.146.
3. **CORPORATIONS.—Dividends.**—A dividend cannot be rightly declared by a corporation until there is a showing that a profit has been really earned for the year such dividend was declared. p.146.
4. **CORPORATIONS.—Dividends.—Payment Out of Capital Stock.—Recovery for Payment of Debts.**—The right to recover dividends paid out of a corporation's capital stock, for the payment of its debts, clearly exists. p.149.
5. **APPEAL.—Review.—Evidence.—Judgment.**—In an action by the trustee in bankruptcy of an insolvent corporation to recover dividends for the benefit of the creditors, the judgment for defendants was not sustained by evidence and was contrary to law, where it was shown without dispute that at the time the dividends were paid the corporation was insolvent. p.149.

From Vanderburgh Circuit Court; *C. A. DeBruler*, Judge

Action by Louis E. Fricke, Trustee in Bankruptcy of the Evansville Implement and Farmers Supply Company, against Nicholas Angemeier and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Elmer Q. Lockyear, Albert W. Funkhouser and Arthur F. Funkhouser, for appellant.

William Reister, for appellees.

SHEA, J.—This action was brought by appellant Louis E. Fricke, trustee in bankruptcy of the Evansville Implement and Farmers Supply Company, against appellees, the stockholders of said corporation, to collect from them certain dividends alleged to have been unlawfully paid. An answer

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in general denial to the second paragraph of complaint formed the issues submitted to the court for trial. Finding and judgment for appellees. Appellant's motion for a new trial was overruled, which ruling is assigned as error.

From the complaint it appears, in substance, that the Evansville Implement and Farmers Supply Company is a corporation which was duly organized under the laws of Indiana on November 21, 1903, with an authorized capital stock of \$10,000, divided into shares of the par value of \$100 each. On September 25, 1905, the capital stock was increased to \$40,000, and afterward, on December 31, 1907, to \$100,000. On November 18, 1908, said corporation was adjudged bankrupt in the District Court of the United States for the District of Indiana, and on December 19, 1908, appellant, Louis E. Fricke, was appointed trustee in bankruptcy. As such trustee, for the benefit of the creditors of the bankrupt corporation, he brought this action against appellees, who were, at all times stated, stockholders in said corporation. This action was brought by appellant against all of the stockholders instead of each of them individually, to prevent a multiplicity of actions. The total amount of indebtedness of said corporation is \$31,377.28, and appellant has converted all of the available assets of the company, consisting of merchandise, accounts, notes and choses in action, into cash, the total amount of which is \$5,922.48, leaving a balance due and unpaid the creditors of \$25,454.80. For the year ending December, 1905, there was a loss of \$6,671.49 in said business, and a net deficit of \$6,813.26. At the close of the year's business, December, 1905, dividend No. 1, of 6%, amounting to \$528 was declared and paid to the stockholders during the ensuing year. For the year ending December, 1906, there was a loss of \$4,583.78 in the business of said corporation, and at that time a total deficit of \$11,397.04. Dividend No. 2, of 7%, amounting to \$1,426.12 was declared at that time, and during the ensuing year was paid to the stockholders out of the capital stock of the corpora-

tion. For the year ending December 31, 1907, there was a loss of \$14,616 making a total deficit of \$26,013.04 in the business of said corporation. Dividend No. 3, of 8%, amounting to \$1,977.24 was declared at that time, and during the ensuing year paid to the stockholders out of the capital stock of the corporation. At the times said amounts were paid to the stockholders, there were no profits of the corporation available for the payment of dividends, and the same were paid out of the capital stock of the company; that the effect of the payment of the money to the stockholders, while being named a dividend, was in truth and in fact refunding to each so much of the capital stock of the corporation as was severally paid to him in the form of dividends, amounting in the aggregate to \$3,931.36, and that the withdrawal and refunding to the stockholders was made before the payment of all the debts of said corporation.

The reasons urged in support of the motion for a new trial are that the decision of the court is contrary to law, and is not sustained by sufficient evidence. The undisputed evidence set out in appellant's brief is shown by the minutes of the meeting of the stockholders, December 31, 1907, to be as follows:

“Assets.

Stock of Merchandise on hand.....	\$32,598.92
Bills Rec. (note & com. Accta.).....	6,069.80
Accounts owing Company.....	4,002.93
Capital Stock.....	40,000.00
Cash on hand and in bank.....	763.94
	<hr/>
	\$83,435.59

Liabilities.

Capital Stock issued.....	\$37,650.00
Stock surrendered and cancelled.....	1,050.00
Bills payable (notes).....	14,133.40
Accounts owing to manufacturers.....	11,880.18
Other accounts owing.....	5,380.78
Dividends unpaid.....	188.28
Stock unsold.....	3,400.00
	<hr/>
	\$73,682.64

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Total Assets.....	\$83,435.59
Total liabilities.....	73,682.64

Net gain.....	\$9,752.95
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Per cent of gain, twenty-four and thirty-five one hundredths per cent.”

Appellant argues that in order to make this showing, the capital stock of \$40,000 is put in as an asset, when it should have been shown only as a liability; that the property of a corporation represented by its capital stock, or by obligations of stockholders to pay the amount subscribed by them, are liabilities of the company, and the stockholder possesses only the right to participate in the earnings of the corporation during its existence; that on dissolution he is entitled to a distributive share of what remains, only after payment of all debts, and where dividends are illegally paid from the capital stock, or when there has been a fraudulent distribution of corporate property before the payment of debts, a court of equity will, at the instance of the defrauded corporate creditors follow the fund into the hands of the stockholders and require its application to the payment of those debts. It is appellant's theory that illegal dividends were paid appellees, and at the time such dividends were paid, the corporation was insolvent, therefore the payment was equivalent to a withdrawal of the capital stock, to the injury of the creditors of the company. It was announced in court at the trial of this cause that dividend No. 1 is not claimed by appellant, consequently the question was whether dividends Nos. 2 and 3 only, could be recovered. It is contended by appellees that the evidence shows when dividend No. 2 was paid, there was a surplus of \$20,759.96, and when dividend No. 3 was paid, a surplus of \$12,887.00, over and above the debts of the corporation at that time; that in estimating the profits for a year for the purpose of declaring a dividend, it is not necessary to take into account the decrease in the value of the assets, and the impairment of the

✓ capital stock of the company prior to that year; that the fact that in a year prior to the declaring of the dividend, some portion of the capital of an incorporated company has been lost and has not since been made good, affords no ground for restraining the payment of a dividend out of profits subsequently made.

It has been held repeatedly in this State, so that we must regard the question as settled, that the capital stock of a corporation is not a trust fund to be held intact for

1. the benefit of creditors, but that the debts of the corporation may be paid, even to directors and stockholders by an insolvent corporation, giving them the preference over other creditors. In the case of *Nappanee Canning Co. v. Reid, Murdock & Co.* (1903), 159 Ind. 614, 621, 64 N. E. 870, 64 N. E. 1115, 59 L. R. A. 199, the following language is used; "In deciding the question before us, it is to be borne in mind that a manufacturing corporation, under the statutes of this State, is strictly a private association, organized and conducted for private purposes only, enjoying no special privileges, and owing no duty to the public or to its creditors except such as is imposed by the terms of the statute under which it is formed, and by those general rules which apply to individuals engaged in business. Until its property passes into the custody of the law by seizure under proceedings in attachment, or by appointment of an assignee, trustee, or receiver, the corporation may sell, transfer, pledge, or mortgage its property in the same manner and subject to the same restrictions only as apply to the case of a private person. Such property is in no respect held in trust for the creditors of the association. The law of this State gives them no lien or claim upon such property. They have no right to look to the corporation or its directors to protect their interests. They deal with it at arm's length, and their attitude is antagonistic to the association. When asked to extend credit to it, all persons dealing with the corporation know that if it is, or thereafter becomes insol-

vent, the whole of its property may be applied to pay or secure debts due to favored creditors, including officers and directors, and that the claims of all other creditors may be excluded and consequently lost. If, with this knowledge credit is given, it can not be said that preferences subsequently conferred upon other creditors have violated any right which the law gave to the creditor whose claim was left unpaid and unsecured. No statute gives to a creditor the right to demand an equal distribution of the assets of an insolvent private manufacturing corporation among its creditors. The maxim that, in case of insolvency, equality is equity has not the force of a statute requiring such a distribution. It is applicable only when the principles of equity are brought to bear upon the distribution of property lawfully in the custody of a court, where such court possesses the authority to make distribution upon that basis."

In the case of *First Nat. Bank, etc., v. Dovetail Body, etc., Co.* (1896), 143 Ind. 550, 553, 41 N. E. 370, 52 Am. St. 435, it is said: "The expression that 'the property of a corporation constitutes a "trust fund" for its creditors,' only means that when the corporation is insolvent and a court of equity has taken possession of its assets for administration, such assets must be appropriated to the payment of its debts before distribution to its stockholders, but as between the corporation itself and its creditors, the corporation does not hold its property in trust or subject to a lien in favor of the creditors in any other sense than does an individual debtor. *Hollins v. Brierfield Coal, etc., Co.* (1893), 150 U. S. 371, 385 [14 Sup. Ct. 127, 37 L. E. 1113], and cases cited; *Sanford Fork, etc., Co. v. Howe Brown & Co. Limited* [1895], 157 U. S. 312 [15 Sup. Ct. 621, 39 L. Ed. 713]; *Fogg v. Blair* [1890], 133 U. S. 534, 541 [10 Sup. Ct. 338, 33 L. Ed. 721]." See, also, other cases cited. In the case of *Levering v. Bimel* (1897), 146 Ind. 545, 553, 45 N. E. 775, it is said: "As between the corporation and its creditors, it cannot, in reason,

be said that the relation is anything more than that of debtor and creditor. The relation of trustee and *cestui que trust* does not exist so as to create a lien upon its assets in favor of the creditor, in any other sense than applies to an individual debtor. This court recently had the question of this trust fund doctrine presented for its consideration, and declined to accept it as it is urged now by the appellees. We held that it did not exist before a corporation is placed under the control of a court for adjustment of its affairs; that until such an event happens, no special lien upon its assets or property exists in favor of any creditor or class of creditors, and that the corporation, prior to such an event, had the power and right to prefer its creditors in like manner and under like circumstances as individuals or copartnerships may do. This rule must now be considered as settled in this jurisdiction." See, also, *Henderson v. Indiana Trust Co.* (1896), 143 Ind. 561, 40 N. E. 516. Thus, in so far as the right of a corporation to pay a debt or debts due the directors or stockholders is concerned, the question is settled in this State, and in fact by a great weight of authority in the Federal Courts, as well as in the courts of other states, but the right of an insolvent corporation to distribute its assets in the form of dividends, or otherwise, to its stockholders, presents to this court a wholly different question. A

2. dividend is not a debt due a stockholder until it has been rightly declared. *American Wire Nail Co. v. Gedge* (1895), 96 Ky. 513, 29 S. W. 353; Taylor, Priv. Corp. (4th ed.) §562; 5 Thompson, Corporations (2d ed.) §5290.

✓ A dividend can not be rightly declared until there

3. is a showing that a profit has been really earned for the year such dividend was declared. 5 Thompson, Corporations (2d ed.) §§5305, 5311; 1 Morawetz, Priv. Corp. (2d ed.) §435; *Mills v. Hendershot* (1905), 70 N. J. Eq. 258, 62 Atl. 542; *Hubbard v. Weare* (1890), 79 Iowa 678, 44 N. W. 915; *Grant v. Southern Contract Co.* (1898), 104 Ky. 781, 47 S. W. 1091; *Lockhart v. Van Alstyne* (1875), 31 Mich. 76,

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18 Am. Rep. 156; *Reid v. Eatonton Mfg. Co.* (1869), 40 Ga. 98, 2 Am. Rep. 563; *Wood v. Dummer* (1824), 3 Mason 308, Fed. Cas. No. 17,944. 2 Cook, Corporations (6th ed.) §548 contains the following language: "As already shown, as against dissenting stockholders and as against corporate creditors a dividend can be lawfully declared only when sufficient net profits have been earned to pay that dividend. Accordingly, a dividend paid wholly or partly from the capital stock may be illegal, and may subject the corporation and the stockholders to serious liability. Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when the dividend was declared, or becoming such at any subsequent time, may, to the extent of their claims, if such claims are not otherwise paid, compel the stockholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock." See, also, *Curran v. Arkansas* (1853), 15 How. (U. S.) 304, 14 L. Ed. 705; *Chicago, etc., Co. v. Howard* (1868), 7 Wall. (U. S.) 392, 19 L. Ed. 117; *Osgood v. Laytin* (1867), 48 Barb. (N. Y.) 463; *Johnson v. Laflin* (1878), 5 Dill. 65, 86, Fed. Cas. No. 7,393, affirmed 103 U. S. 800, 26 L. Ed. 532; *Hastings v. Drew* (1876), 76 N. Y. 9, 19; *Sagory v. Dubois* (1846), 3 Sandf. Ch. *466; *Wood v. Dummer, supra*; *Gratz v. Redd* (1843), 4 B. Mon. (Ky.) 178; *Heman v. Britton* (1885), 88 Mo. 549; 2 Story, Eq. Jurisp. (13th ed.) §1252. "A stockholder who receives an illegal dividend is liable for it, even though he has paid it over to another person to whom the stock belonged. *Finn v. Brown* (1891), 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936."

In the case of *Mobile, etc., R. Co. v. Tennessee* (1894), 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793, it is said: "The term 'dividend' in its technical as well as in its ordinary acceptation means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders. *Lockhart v. Van Alstyne, supra*;

Boone on Corporations §125. In the present case it appears that the maximum capital stock authorized by the charter was \$10,000,000, and that the stock actually issued by the company at various times during the construction of the road, and outstanding, amounted to the sum of \$5,320,600, which, together with the company's bonded indebtedness, fairly represented the cost of building and completing the road. The amount of stock being fixed, it was a matter of mere calculation as to when the profits from net earnings would be sufficient to meet the designated dividend. Again, dividends can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or creditors from making a distribution, in dividends, of capital. Taylor, Priv. Corp. (4th ed.) §565, and authorities cited. The term 'profits' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans. *Corry v. Londonderry R. Co.* [1860], 29 Beav. 263. The net earnings of corporations out of which profits are distributable in dividends are thus defined in *St. John v. Erie R. Co.* [1872], 10 Blatch. 27, [Fed. Cas. No. 12,226]: 'Net earnings are properly the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains—that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends, which, in that way, are paid out of the net earnings.' This case was affirmed by this court, [*St. John v. Erie R. Co.* (1874)], 22 Wall. 136 [22 L. Ed. 743]. In *New York, etc., R. v. Nickals* [1886], 119 U. S. 296, 308 [7 Sup. Ct. 209, 30 L. Ed. 363], the same general rule that shareholders are entitled only to dividends out of the net earnings derived from the operation of the company is reaffirmed."

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The right to recover dividends paid out of the capital stock, sufficient to pay debts, is clearly held in *Mills v. Hendershot, supra*, where it is said: "Stockholders are liable to the receiver for dividends paid out of the capital, so far as necessary for the payment of debts."

Williams v. Boice (1884), 38 N. J. Eq. 364; See, also, 5

Thompson, Corporations (2d ed.) §5360. The evidence shows without dispute that at the time of the payment of the dividend declared in December, 1906, as well as at the time of the payment of the dividend declared in 1907, the corporation was insolvent, and any dividend paid was therefore being paid out of its capital stock, and to the injury of its creditors then existing and those who became subsequent creditors. To hold that corporations may pay dividends under such circumstances, would be, in effect, to say that all of the assets of a corporation might be distributed to its stockholders in the form of dividends, to the injury of its creditors. The judgment is not sustained by the evidence, and is contrary to law.

Judgment reversed with instructions to grant appellant's motion for a new trial.

NOTE.—Reported in 101 N. E. 329. See, also, under (1) 10 Cyc. 1252, 1253; (2) 10 Cyc. 546; (3) 10 Cyc. 551; (4) 10 Cyc. 549; (5) 10 Cyc. 550. As to stockholders' rights and remedies in regard to dividends, see 99 Am. Dec. 761. As to the nature corporate stock has as property in the hands of the stockholder, see 57 Am. St. 379. As to the right of an insolvent corporation to prefer creditors, see 15 Am. Cas. 1218.

VOLLMER v. BOARD OF COMMISSIONERS OF THE COUNTY OF DUBOIS.

[No. 8,557. Filed March 26, 1913.]

1. STATUTES.—*Construction.—Legislative Intent.*—In construing a statute the legislative intent is to be ascertained from an examination of the whole as well as the separate sections or parts of an act, and such intent, when so ascertained, will control the

- strict letter of the statute, or the literal import of the words or terms, if adherence to such strict letter or literal import would lead to injustice, absurdity or contradictory provisions. p. 153.
2. **STATUTES.—Construction.—Meaning of Words.**—In the construction of a statute the language used will be accepted in its ordinary and popular meaning, unless so to do will defeat the legislative intent, in which event the words may be given a particular or technical meaning so as to effectuate such intent. p. 153.
3. **EXTRADITION.—Identification of Fugitive.—Statutes.—Justices of the Peace.**—The authority granted by §§1900-1903, 1905, 1907 Burns 1908, dealing with the procedure in the apprehension and identification of fugitives from justice from other states found in this State, and authorizing the necessary steps to be taken before any "court, judge or justice of the peace authorized to issue warrants in criminal cases," does not authorize the identification of the accused before a justice of the peace after he is in custody on the warrant of the governor of this State. p. 154.
4. **EXTRADITION.—Expenses of Officer.—Statutes.—"Judge."—"Justice of the Peace."**—Construing as a whole the statutory provisions relating to the apprehension and extradition of fugitives from justice (§§1892-1909 Burns 1908), it was not the legislative intent in the act of March 5, 1909 (Acts 1909 p. 165), amendatory of §42 of the act of March 10, 1905 (Acts 1905 p. 584, §1909 Burns 1908), to include justices of the peace as "judges" before whom the proceedings provided by said section are authorized for the apprehension of fugitives from justice who are beyond the State, so that where such proceedings were had before a justice of the peace, his certification of the expenses incurred in apprehending and returning the fugitive did not create any demand against the county. pp. 154, 155.
5. **EXTRADITION.—Right to Send Fugitive Out of State.**—A fugitive from another state may not lawfully be sent out of this State until identified by a court designated in the statute. p. 155.
6. **WORDS AND PHRASES.—"Judge."—"Justice of the Peace."**—The term "justice of the peace" has a definite meaning to designate one who presides over a particular court of inferior jurisdiction, and "judge" ordinarily is used to designate the person who holds a judicial office authorizing him to transact the business of a court whose jurisdiction is superior to that of a justice of the peace. p. 155.
7. **COUNTIES.—Claims Against County.—Validity.—Duty of Claimant.**—One who presents a claim against a county must point out a statute authorizing its payment and show that he has fully complied with its provisions. p. 156.

From Dubois Circuit Court; *John L. Bretz*, Judge.

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Action by Ferdinand Vollmer against the Board of Commissioners of the County of Dubois. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Bomar Traylor, for appellant.

Richard M. Milburn, for appellee.

FELT, P. J.—This action is based on a claim of appellant, against Dubois County, Indiana, for expenses incurred as agent of this State in the return of a person charged with crime from the state of California to said county. On Sept. 14, 1909, an affidavit was filed before Frank L. Betz, a justice of the peace, in Dubois County, Indiana, charging one Alois Beiter with the crime of wife desertion. A warrant was duly issued by said justice of the peace for the arrest of the defendant. Joseph Kraft, Sr., marshal of the town of Jasper, Indiana, made application to the Governor of Indiana, for requisition papers to bring the defendant from the state of California, which application was approved by Horace M. Kean, deputy prosecuting attorney. Requisition papers were thereupon duly issued by Thomas R. Marshall, Governor of Indiana, on September 15, 1909, commissioning the appellant, who was then the duly elected, qualified and acting sheriff of said Dubois County, as agent of this State to apprehend and return said Beiter to the State of Indiana.

Appellant duly performed this duty and thereafter filed his claim for mileage and the same was presented to the Board of Commissioners of Dubois County in accordance with the act of March 5, 1909 (Acts 1909 p. 165), amending §42 of the act of March 10, 1905 (Acts 1905 p. 584, §1909 Burns 1908). The claim in the sum of \$250.91 was disallowed by said board and an appeal was duly taken to the Dubois Circuit Court where a demurrer to said claim, by appellee, on the ground that the same does not state facts sufficient to constitute a valid claim against said county, was sustained. Appellant refused to plead further, judgment was rendered against him for costs and this appeal was

taken. The only error assigned is that the court erred in sustaining the demurrer.

The claim was certified by the justice of the peace before whom the affidavit was filed and was held insufficient on the ground that the statute does not authorize payment except “upon certificate of the judge before whom said indictment or affidavit is on file,” and that a justice of the peace is not a judge within the meaning of the statute authorizing such payment of expenses. Amended §42, *supra*, after providing for the issuance of the requisition for the person to be apprehended, states that “the judge before whom the said indictment or affidavit is filed, shall issue a warrant for the arrest of said criminal,” and also specifies the compensation of the agent charged with the duty of apprehending and returning the fugitive to this State, and then provides that: “The said agent shall be reimbursed for all money legally expended to obtain possession of said criminal upon presentation of receipts covering the same together with a sworn statement by him that such items of expenditure are true and correct. Such sum shall be paid out of the county treasury of the county in which the said crime was committed upon certificate of the judge before whom said indictment or affidavit is on file, stating that the said criminal has been brought before him and arraigned and on the verified statement of said agent certified to by the said judge, filed with the auditor of the said county who shall draw his warrant therefor. And the county council shall make such appropriation as shall be necessary to carry out the provisions of this act.” The act of 1905, *supra*, being §§1892-1909 Burns 1908, covers the subject of fugitives from other states found in this State and those who have fled from this State, and amended §42 of the act supersedes or takes the place of §1909, *supra*, of the statute.

In construing any statute, the legislative intent must be kept constantly in view and if the language is plain and unambiguous, the legislative intent as expressed by the

language must prevail. Such intention, however, is

1. to be ascertained from an examination of the whole as well as the separate sections or parts of an act; and when so ascertained, the intention thus expressed will control the strict letter of the statute, or the literal import of words or terms where to adhere to such strict letter or literal import would lead to injustice, absurdity or contradictory provisions. *Greenbush Cemetery Assn. v. Van Natta* (1912), 49 Ind. App. 192, 94 N. E. 899-902; *Hyland v. Rochelle* (1913), 179 Ind. 671, 100 N. E. 842.

The language of a statute will be accepted in its

2. ordinary and popular meaning unless so to do will manifestly result in the defeat of the legislative intent. Where such result would follow, words may be given a particular or technical meaning indicated by the act to be the sense in which they were employed, if by such interpretation the legislative intent may be carried into effect. *Masse v. Dunlap* (1896), 146 Ind. 350, 358, 44 N. E. 641; *Starr v. Board, etc.* (1907), 40 Ind. App. 7, 9, 76 N. E. 1025, 79 N. E. 390; *Hyland v. Rochelle, supra*.

Section 1892 Burns 1908, Acts 1905 p. 584, §25, deals with fugitives within the State and provides how they may be apprehended and taken back to the county where the offense was committed by proceedings before justices of the peace. Sections 1893-1908 Burns 1908, Acts 1905 p. 584, §§26-41, deal with fugitives from other states found in this State. Sections 1893, 1894, *supra*, provide for the identification of the fugitive when in custody on a warrant issued by the governor of this State, by bringing him "before the circuit, superior or criminal court or judge of this State nearest or most convenient." Section 1895, *supra*, authorizes the commitment of the prisoner when no agent of the State making the demand is present and provides that "Such court or judge shall forthwith inform the governor of this state of the fact of such commitment." Sections 1898, 1899, *supra*, refer to "the court or judge" with reference to "such

examination'' of the alleged fugitive after he is in custody on a warrant from the governor of this State. Sections 1900-1903, 1905, 1907, *supra*, all deal with some phase of the proceeding in the apprehension and identification of fugitives from justice from other states or territories found in this State, and authorize the necessary steps to be taken before any ''court, judge or justice of the peace authorized to issue warrants in criminal cases.'' But the authority granted by these sections does not authorize the identification of the accused after he is in custody on the warrant of the governor of this State, except as provided in §1894, *supra*. Section 37 of the act being §1903, *supra*, provides for notice to the governor of this State after such fugitive is in custody, and §1904, *supra*, provides that ''it shall be the duty of the governor to issue his warrant, as provided in section twenty-six of this act, and like proceedings shall be had as if such fugitive had been originally demanded by the governor of the state or territory where such offense is alleged to have been committed, as provided in this act.'' Section 1905, *supra*, provides that the person holding the governor's warrant ''may at all times take him into custody, and take him before the proper court or officer for examination, as provided in section twenty-six, and such arrest shall be a discharge of the recognizance if there was one given.'' Section 1909, *supra*, §42 of the act of 1905, makes no reference to courts, judges or justices of the peace. In view of the foregoing provisions of the act, we can not presume that the legislature in amending §42 intended to include justices of the peace.

The statute clearly limits the authority of justices of the peace to the steps provided in the apprehension of a fugitive in this State up to the time he is taken into custody on the warrant of the governor of this State, and then he cannot be taken to another jurisdiction until he has been brought before ''the circuit, superior or criminal court or judge of this State.'' The amended section is not

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ambiguous when read in the light of the other sections

5. of the law on the same general subject. A fugitive from another state may not lawfully be sent out of this State until brought before a court, designated in the statute, for identification. The act draws a clear line

4. of distinction between the preliminary steps to apprehend a fugitive from another state, found in this State, and to place him in custody on the warrant of the governor, and the further steps necessary to authorize his transportation out of the State. On the other hand, the act when considered in all its parts, is equally clear that the legislature in providing the steps to be taken to bring to this State a fugitive who had escaped to another state or territory, used the word "judge" advisedly and intended it should be given its usual and popular meaning. The word might be so used as to include justices of the peace, but such is not its plain and usual meaning. In fact the title, justice of the peace, is recognized by our Constitution and has

6. a definite meaning to designate the person who presides over a particular court of inferior jurisdiction. The title "judge" in this State is ordinarily employed to designate the person who holds a judicial office authorizing him to transact the business of a court whose jurisdiction is superior to that of a justice of the peace. There can

4. be no presumption that the legislature intended the word so employed in the amended section to include the inferior judicial office of justice of the peace, and we could not in any case so hold unless there was something to clearly indicate an intention that the word judge was intended to include such officer. Here the language employed and the subject-matter considered both indicate that it was not intended that the word judge should be given a meaning other than that it usually imports. It is our conclusion that the proceeding before the justice of the peace to apprehend the alleged fugitive for whose return the expense was incurred, is unauthorized by the statute, and that his certifica-

tion of the expenses was likewise unauthorized, and therefore did not create any demand against the county for its payment. It is a well-recognized principle of law

7. supported by numerous decisions of our courts that a person who presents a claim against a county must point out a statute authorizing its payment and show that he has fully complied with its provisions.

The apparent hardship of this case must not be allowed to make bad law. The statute has not been followed and the court did not err in sustaining the demurrer.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 321. See, also, under (1) 36 Cyc. 1108, 1111, 1128; (2) 36 Cyc. 1114; (3, 5) 19 Cyc. 100; (4) 23 Cyc. 504; 21 Cyc. 308; (6) 23 Cyc. 504; 24 Cyc. 402; (7) 11 Cyc. 430, 595. As to intent of lawmakers, also ordinary meaning of words used, as essential considerations in construing a statute, see 12 Am. St. 827. As to proceedings for extradition of persons charged with crime, see 57 Am. Dec. 389; 112 Am. St. 103.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. TRUE.

[No. 7,742. Filed December 13, 1912. Rehearing denied March 26, 1913.]

1. PLEADING.—*Complaint.*—*Sufficiency.*—*Negligence.*—A complaint against a railroad company for damages resulting to plaintiff's land from the obstruction of a natural watercourse and the excavation of a new channel through which the waters of the stream were diverted, is not objectionable for failure to aver a negligent construction of the artificial waterway, where facts are averred from which no other inference than that of negligence can be drawn. p. 159.
2. APPEAL.—*Assignment of Errors.*—*Questions Reviewable.*—*Sufficiency of Complaint.*—No question as to the sufficiency of the complaint is presented on appeal, where the assignment of errors does not show that any error is predicated upon the legal sufficiency of the complaint or upon appellant's exception to the action of the trial court in overruling a demurrer thereto. p. 159.
3. APPEAL.—*Assignment of Errors.*—*Questions Reviewable.*—The assignment of errors constitutes appellant's complaint on appeal.

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and only such questions will be considered as are thereby presented. p. 160.

4. **RAILROADS.—Construction.—Diverison of Watercourse.—Duty of Railroad Company.**—Although under the grant of power given by subd. 5, §5195 Burns 1908, §3903 R. S. 1881, a railroad company may fill up a natural watercourse and lay its tracks on the embankment constructed in the bed of such stream, it is charged by the same section with the duty of providing a waterway no less efficient than the one appropriated. p. 160.
5. **APPEAL.—Review.—Admission of Evidence.**—Where, in an action for damages caused by the filling of a watercourse and diverting the water into an artificial channel, appellee had testified that the artificial channel was not of sufficient size and capacity to accommodate the water formerly flowing through the creek, and that it was enlarged by washing, that a stone wall had washed out and earth and rock deposited in the creek filling it four or five feet, the court did not err in permitting appellee to answer a question asking him to state, if he knew, what caused the filling at another point in the creek, since the question, taken in connection with the examination immediately preceding, called for a fact and not a conclusion. p. 160.
6. **TRIAL.—Interrogatories to Jury.—Propriety.—Action for Damages.**—In an action against a railroad company for damages resulting from the filling of a creek and diverting the water through a new channel constructed by defendant, the court did not err in refusing to submit to the jury interrogatories requested by defendant asking the market value per acre of plaintiff's bottom lands both before and after the filling and relocation of the creek, and asking the market value per acre of the farm other than the bottom lands both before and after such filling and relocation, since the plaintiff could not under the issues prove his damages piecemeal and the ultimate fact to be found was the damage to the farm as an entirety. pp. 161, 162.
7. **WITNESSES.—Cross-Examination.**—On cross-examination a party is clearly within his rights in asking a witness, who has testified as to values, any question pertinent to the direct examination which tends to test the knowledge of values as given by such witness. p. 161.
8. **DAMAGES.—Trial.—Interrogatories to Jury.—Itemizing Damages.**—As a general rule it is improper in tort actions to require the jury to answer interrogatories itemizing the elements of damage, where it is unnecessary to plead such elements of damage. p. 162.
9. **TRIAL.—Verdict.—Interrogatories to Jury.—Duty of Court.**—It is the duty of the court to require the jury to answer pertinent and material interrogatories when properly requested in case a

general verdict is returned, and, in a proper case, the court's refusal to do so is reversible error. p. 162.

10. TRIAL.—*Verdict.—Special Findings.—Object of Special Findings.*—The object of the special finding is to control the general verdict, if, under the law the particular facts found are inconsistent therewith, and also to test the correctness of such general verdict. p. 162.

11. TRIAL.—*Verdict.—Answers to Interrogatories.*—A general verdict is to be found upon all the evidence, and each interrogatory is to be answered from the evidence without reference to the general verdict or to the answer to any other interrogatory. p. 162.

From Dearborn Circuit Court; *George E. Downey*, Judge.

Action by Stephen W. True against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

L. J. Hackney, F. L. Littleton and T. S. Cravens, for appellant.

Estal G. Bielby, for appellee.

ADAMS, J.—Prior to and during the year 1905, the appellant made certain changes in its railroad and roadbed, by reducing the grade and straightening its tracks. At a point in Dearborn County, Indiana, near to the lands of appellee, appellant, in the prosecution of such work, filled up the channel of Tanner's Creek, a natural watercourse, for a distance of 1000 feet, and constructed a fill of earth and stone in the bed of said natural watercourse for its track to rest upon, and excavated a new channel for said creek immediately south of the original watercourse. The natural channel of Tanner's Creek was sixty feet wide, and of ample capacity to receive and carry off the water, for which it provided an outlet, without injury to appellee's lands. The channel constructed by appellant was but twenty feet wide, and not large enough to accommodate the water received into said creek during the rainy season. As a result a new channel forty-five feet wide was washed out for a distance of 750 feet, and earth and stone washed from said new

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channel was deposited in the bed of said creek at the point where Fly's Run empties into Tanner's Creek. These are briefly some of the averments of the complaint, with the further averment that on account of insufficient capacity of the new waterway, appellee's bottom lands were rendered unfit for farming purposes, to his damage in the sum of \$3,000. An issue of fact was formed by an answer in denial, the cause was tried by a jury, resulting in a verdict for appellee in the sum of \$850, upon which verdict the court rendered judgment.

The errors assigned separately are all embraced in the specification that the court erred in overruling appellant's motion for a new trial. With its general verdict, the jury returned answers to certain interrogatories. By these answers, the jury found that the bottom lands of appellee at the time of the reconstruction of appellant's railway embraced ten acres, and that appellee's entire farm embraced 169 acres; that the bottom lands were not subject to overflow from Tanner's Creek or Fly's Run before such reconstruction; that the market value of appellee's farm was \$35 per acre before, and \$30 per acre after the reconstruction and relocation of appellant's railway; that ten acres of appellee's bottom land were subject to overflow after the relocation of Tanner's Creek, and that no part of said bottom lands was subject to overflow before such reconstruction.

Appellant urges in its brief that the complaint is

1. insufficient in that it does not aver negligent construction of the artificial waterway. We think the complaint is good, as facts are averred from which only the inference of negligence could be drawn. But, even if this were not true, the sufficiency of the complaint is not
2. before us for determination. The assignment of errors does not show that any error is predicated upon the legal sufficiency of the complaint or upon appellant's exception to the holding of the court in overruling its demurrer thereto. It has been held so often as to become almost ele-

mental that the assignment of errors constitutes the

3. appellant's complaint in this court, and only such questions will be considered as are presented by the assignment.

Under the grant of power given by subd. 5, §5195 Burns 1908, §3903 R. S. 1881, the appellant had a right to fill up the natural watercourse, and to lay its tracks on the

4. embankment constructed in the bed of such watercourse. But, by the same section, appellant was charged with the duty of providing a waterway no less efficient than the one appropriated. It is not seriously contended by appellant that such waterway was provided, and the questions presented by the record and briefs relate to the damages assessed by the jury, and the action of the court in rejecting and refusing to give to the jury certain interrogatories requested by the appellant, the ruling of the court in rejecting each of said interrogatories being separately assigned as a cause for a new trial. Appellant

5. also urges as one of the grounds for a new trial that the court erred in permitting appellee to testify, over objection, in answer to the question "you may state to the jury, if you know, what it is that has caused the change of depth of the channel of Tanner's Creek at this particular place?" as follows: "A filling up of the channel with rock and soapstone and so forth." Appellant insists that this question calls for an opinion and not for a statement of fact. The record discloses that appellee, before the question objected to was asked, had testified that the new channel constructed by appellant was not of sufficient size and capacity to accommodate the water formerly carried through Tanner's Creek, and that the new channel was enlarged by washing, that there was a stone wall washed out, and earth and rock deposited in the creek filling it four or five feet. The witness was then asked to state, if he knew, what caused the filling at another point in the creek. We think the question

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asked, taken in connection with the examination immediately preceding, called for a fact and not a conclusion.

A more serious proposition is presented by the refusal of the court to submit to the jury interrogatories requested by appellant. By interrogatory No. 10 the jury was asked to find specially the market value per acre of appellee's bottom lands, as a part of the farm, before the reconstruction of appellant's railroad and the relocation of Tanner's Creek. By interrogatory No. 11, the jury was asked to find such value after such reconstruction and relocation. By interrogatory No. 14, the jury was asked to find the market value per acre of the farm other than the bottom lands, taken as a part of the farm, before the reconstruction of appellant's railroad and the relocation of Tanner's Creek. By interrogatory No. 15, the jury was asked to find the market value of such part of the farm as a part thereof, after such reconstruction and relocation. The evidence offered from which each of these interrogatories might have been answered by the jury was brought out on cross-examination of witnesses testifying as to the market value of the farm before and after the relocation of appellant's railroad. It was proper cross-examination, and appellant was clearly within its rights in asking any question pertinent to the direct examination, which tended to test the knowledge of values as given by appellee's witnesses, to the end that the jury might determine their credibility and the weight to be given to the testimony of each, in returning its general verdict. But the ultimate fact to be found was the damage to the farm as an entirety, and not to its several parts as distinct entities or as parts of the whole. Under the issues formed in this case, the plaintiff could not prove his damages piecemeal, and the defendant was not entitled to have the jury specially find the damages in that manner. By §572 Burns 1908, Acts 1897 p. 128, it is provided "That in all actions hereafter tried by a jury, the jury shall render

a general verdict, but in all cases, when requested by either party, the court shall instruct them when they render a general verdict to find specially upon particular questions of fact to be stated to them in writing in the form of interrogatories. * * *

8. The general rule is that in actions of tort, it is improper to require the jury to answer interrogatories itemizing the elements of damage, where it is unnecessary to plead such elements of damage. *Elijah v. Dowling* (1912), 49 Ind. App. 515, 97 N. E. 551. But it is the duty of the court to require

9. the jury to answer pertinent and material interrogatories when properly requested in case a general verdict is returned. *Clegg v. Waterbury* (1882), 88 Ind. 21, 23. And in a proper case it is reversible error for the court to refuse to submit interrogatories to the jury. *McCullough v. Martin* (1895), 12 Ind. App. 165, 167, 39 N. E. 905. The object of the special finding is that if,

10. under the law, the particular facts found are inconsistent with the general verdict, the latter shall thereby be controlled. *Manning v. Gasharie* (1866), 27 Ind. 399, 409. The further object of the special findings is to test the correctness of the general verdict. *McCullough v. Martin, supra*.

It will be noted that a jury is only required to

11. answer interrogatories in the event that a general verdict is returned. The general verdict is to be found upon all the evidence, and each interrogatory is to be answered from the evidence without reference to the general verdict or to the answer to any other interrogatory.

6. Thus, in the instant case, if the special answers disclosed a difference between the amount of damages to the whole farm and the aggregate damages to its several parts, and the general verdict was supported by the answer as to the whole farm, the conflicting answers would but nullify each other, and the general verdict would stand. But independent of this consideration, we think the rejected

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interrogatories, in effect called upon the jury to say what amount of damages was awarded on account of the bottom lands and what amount on account of the up lands. This would require an itemizing of damages in an action where special damages are not claimed.

The judgment is affirmed.

NOTE—Reported in 100 N. E. 22. See, also, under (1) 29 Cyc. 569; 40 Cyc. 584; (2) 2 Cyc. 988, 989; (3) 2 Cyc. 980; (4) 33 Cyc. 325, 326; (5) 17 Cyc. 62; (6) 38 Cyc. 1909; (7) 40 Cyc. 2489, 2490; (8) 38 Cyc. 1912; (9) 38 Cyc. 1908, 1909; (10) 38 Cyc. 1907; (11) 38 Cyc. 1919. As to opinions of a nonexpert and where and when admissible in evidence, see 19 Am. Rep. 410; 30 Am. St. 38. As to cross-examination to test accuracy and animus, see 14 Am. St. 480.

CERTAIN ET AL. v. SMITH.

[No. 7,843. Filed March 27, 1913.]

1. **APPEAL.—Review.—Ruling on Demurrer to Answer.**—It is reversible error to sustain a demurrer to a good paragraph of answer, unless its averments may be established by proof admissible under the averments of another paragraph. p. 167.
2. **BILLS AND NOTES.—Actions.—Defenses Provable Under General Denial.**—In an action on a promissory note brought by the assignee against the maker and the assignor, an agreement between the maker and the payee providing a method for the partial discharge of the obligation in a manner different from that set out in the note, and a partial discharge made in accordance therewith, could not be shown under a general denial. p. 167.
3. **BILLS AND NOTES.—Actions.—Defenses.—Discharge in Manner Different From That Provided in Note.**—The payee of a note may agree with the maker for a means or method of discharging the obligation in a manner different from that set out in the note by agreement made either at the time of the execution and delivery of the note, or thereafter while it remains the property of the original payee, and such agreement, when shown to have been duly executed, presents a good defense to an action on the note while it is in the hands of the parties, or their assignees with notice. p. 167.
4. **BILLS AND NOTES.—Actions.—Answer Alleging Discharge Different From Method Provided in Note.—Sufficiency.—Notice to Purchaser.**—In an action by the assignee of a promissory note, an answer by the maker alleging an agreement for discharging part of the note by paying an obligation of the payee to another party,

and the payment of such obligation by the maker pursuant to such agreement, should also aver that the assignee had notice of the arrangement before he became a purchaser thereof for value. p. 167.

5. **BILLS AND NOTES.—Actions.—Defenses Against Bona Fide Purchaser.—Discharge in Manner Not Provided in Note.—Notice to Purchaser.**—The purchaser of a promissory note without notice, but for less than its full value, who is afterwards notified of an agreement between the maker and payee by which the maker, in partial discharge of the note, was to pay, and had paid, an obligation owing by the payee to another party, holds the note as an innocent purchaser only to the extent of the consideration paid at the time of receiving such notice, and, as to the consideration unpaid, subject to the maker's defense of discharge under such agreement. p. 168.
6. **TENDER.—Pleading.—Sufficiency.**—In an action on a promissory note by one who had purchased it without notice, but had paid less than its full value, and, before paying the full value, had received notice of a credit to which the maker was entitled, allegations in the answer of a tender by the maker of the balance due after deducting the amount of such credit, which plaintiff refused to accept, were sufficient as to tender. p. 169.

From Superior Court of Vigo County; *John E. Cox*, Judge.

Action by Charles L. Smith against Milton Certain and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Foley, Royse & O'Mara, for appellants.

Hughes & Caldwell and *R. B. Stimson*, for appellee.

IBACH, C. J.—This was a suit on a promissory note for the amount of \$400 payable in bank, executed by appellants, Certain and McCullough, to appellant, Riddles, and assigned to appellee, Smith. It is averred in the amended complaint that the note was executed on April 2, 1907, made payable sixty days after date, was endorsed in blank on May 30, 1907, by the payee, Riddles, and delivered on the same day to appellee, Smith, for value. To this amended complaint appellants filed answer in four paragraphs, the first of which was a general denial. By the fourth paragraph of answer defendants, Certain and McCullough, admitted the execution

on April 2, 1908, of the note sued on, and that afterwards the note was transferred to the plaintiff by Riddles. They say therein that after the execution of said note, Certain, the maker, and Riddles, the payee, entered into the agreement, to wit: "Said Certain agreed and promised that he would pay and satisfy a certain debt owing by said Riddles to the Peoples Brewing Company of Terre Haute, Indiana, which debt was in the sum of \$150.90, and that he would assume such indebtedness and procure the release of said Riddles from said indebtedness, and in consideration whereof the said Riddles agreed and promised that said sum of \$150.90 should be credited on said note and be part payment of said note. That thereafter, on the 18th day of May, 1908, defendant, Certain, did satisfy and pay to the Peoples Brewing Company the sum of \$150.90 in payment of the claim of said Peoples Brewing Company against said Riddles, and did secure the release and discharge of said Riddles from said debt by said Peoples Brewing Company, all in accordance with said agreement between said Riddles and said Certain. That after said Certain had paid and satisfied said debt of said Riddles to said Peoples Brewing Company for the sum of \$150.90 for the benefit of said Riddles and in accordance with said agreement between said Certain and said Riddles, and after said Certain had procured the discharge and release of said Riddles from said debt by said Peoples Brewing Company in accordance with said agreement between said Certain and said Riddles, said Riddles sold said note to the plaintiff herein and endorsed said note in blank on the back thereof." That said plaintiff agreed to pay to said Riddles for said note the sum of \$400, but before the plaintiff had paid to Riddles said sum of \$400, and at the time he had paid to Riddles on account of the purchase price of the note only the sum of \$75, defendant, Certain, notified the plaintiff of the agreement and contract between said Riddles and said Certain concerning the payment to the Peoples Brewing

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the debt of Riddles and the agreement that the said debt should apply upon said note toward thereof, and defendant Certain notified plaintiff to Riddles the purchase price of said note, and therefrom the sum of \$150.90. Defendant, at the time tendered to said plaintiff the sum of \$255, was the balance due on said note after deducting therefrom the sum of \$150.90, and plaintiff refused to accept said tender, Certain, at the time of tendering said sum to the plaintiff, also tendered and offered plaintiff from the Peoples Brewing Company for the \$150.90 paid by defendant, Certain, on behalf of Riddles, in accordance with the contract between them for payment of said note. That defendant, Certain, at all times ready and willing to pay plaintiff the sum of \$255, and plaintiff refused to accept the tender, defendant now pays into court for the benefit of plaintiff the sum of \$255 and the receipt of the Peoples Brewing Company for the sum of \$150.90, paid by defendant for the debt of Riddles, in accordance with the agreement for payment of said note. That defendant, Certain, delivered said money and said receipt to plaintiff before he had put said note in the hands of an attorney, and any action had been brought upon said note. That defendant, McCullough, signed said note as surety for Riddles, Certain.

The first two paragraphs of the second and third paragraphs of the answer are similar to those of the fourth, except that it is in the second paragraph that the agreement between Riddles and the Peoples Brewing Company was made at the time of the issue of the note. To each of these affirmative answers of answer appellee filed his separate demurrers, which were sustained by the court. Upon the issues of fact and law presented for appellee and awarded him judgment for \$525. The only error presented to

this court is the court's action in sustaining the demurrers to the second, third and fourth paragraphs of answer.

The law is well settled that where a demurrer is

1. sustained to a good paragraph of answer, reversible error is committed, unless the averments contained in such paragraph may be established by proof admissible under the averments of another paragraph. *McAfee v. Bending* (1905), 36 Ind. App. 628, 635, 76 N. E. 412.

2. The only paragraph of answer in the record to which the trial court did not sustain a demurrer was a general denial, and it cannot be claimed that under it the affirmative matter contained in the three affirmative answers or any of them, could have been shown. So that if we find the affirmative answers, or any of them sufficient to constitute a defense to the suit, the action of the trial court in sustaining the demurrers will be held to be reversible error.

The law is also well settled that the payee of a

3. promissory note may agree with the maker for a means or method of discharging the obligation in a manner different from that set out in the note and this agreement may be made at the time of the execution and delivery of the note, or thereafter, while it remains the property of the original payee, and when such an agreement made between the parties is shown to have been duly executed, it presents a good defense to an action on the note while it is in the hands of the parties, or their assignees with notice. To enable the appellants to insist upon

4. a credit on this particular note in the hands of appellee, Smith, for the amount of the payment made by appellant, Certain, in accordance with the agreement with appellant, Riddles, it must appear by proper averment that Smith had notice of the arrangement, before he became a purchaser thereof for value. These answers fail to disclose any notice to Smith of any character of any defense on the part of the makers of the note, before the date of the assignment to him.

It is insisted by appellants, however, that the answers are sufficient to show notice on the part of the assignee before he had paid the full purchase price of the 5. note, and that he was protected as an innocent purchaser of the note against all defenses only to the extent of his payments made before notice, and that as to the residue of the consideration agreed to be paid by him, having had notice of this defense before such balance was paid, he to that extent took it subject to the same equities and defenses that appellants had if it remained in the hands of the original owner. The theory upon which appellee claims a right to recover is that he is an innocent purchaser of the note before maturity without notice of any defenses against it, while appellant by his affirmative paragraphs of answer claims that the debt to the Peoples Brewing Company was paid before the assignment to appellee, and when appellee had paid but \$75 of the purchase price he was informed of such payment, and was tendered the receipt from the brewing company and the balance of the amount of the note. The controlling question then is, Did the notice which was obtained by the assignee before full payment of the purchase price change his character from that of a *bona fide* purchaser without notice to that of a purchaser with notice, who would take the note, as to the amount of the consideration remaining unpaid, subject to the defense here claimed? We have been unable to find a case and believe none can be found where this point has been determined with reference to a defense precisely like the one here presented, but we have found expressions of the courts in similar cases which seem controlling here. In *Hubbard v. Chapin* (1861), 2 Allen (Mass.) 328, it was held that the purchaser of a note given for an illegal consideration, who discovered the consideration after he had made some payments on the purchase price, but before he had completed payment of such purchase price, was a *bona fide* purchaser only as to the amounts paid before notice. It was held in

Dows v. Kidder (1881), 84 N. Y. 121, 125, that where the defendants paid in part the consideration for certain bills of exchange wrongfully transferred, before receiving notice of the wrongful transfer, they were *bona fide* holders only to the extent of such payment. In *Dresser v. Missouri, etc., R. Co.* (1876), 93 U. S. 92, 23 L. Ed. 815, it was held that the purchaser of notes obtained by fraudulent representations is a *bona fide* purchaser only to the amount advanced before knowledge of the fraud, and that upon receiving notice of the fraud his duty is to refuse further payment. In the case of *Campbell v. Brown* (1898), 100 Tenn. 245, one who obtained a \$200 note to negotiate for the benefit of Brown the maker borrowed \$55 on it as collateral, then transferred it to Campbell, who paid off the \$55 note, but did not complete payment of the purchase price. He was told that the note had been wrongfully transferred before he made any further payments, and was held a *bona fide* purchaser only to the amount of \$55. See, also, Joyce, Def. to Com. Paper §119. If the sum of \$75 had been the full consideration for the note here involved, there could be no question but that these answers would be insufficient, and appellee would have been held a *bona fide* purchaser even though the consideration was small in comparison with the face of the note. But in view of the facts averred in the second, third and fourth paragraphs, we are inclined to hold that appellee was an innocent purchaser of the note only as to the sum of \$75, and was not an innocent purchaser as to any amount above that paid by him. The allegation as to the tender made by appellant to appellee is sufficient, under the authority of *Supreme Tent, etc., v. Fisher* (1910), 45 Ind. App. 419, 90 N. E. 1044.

6. For the reasons given above, the second, third and fourth paragraphs of answer must be held sufficient, and the action of the trial court in sustaining the separate demurrers thereto is error, for which the cause must be reversed.

Judgment reversed.

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NOTE.—Reported in 101 N. E. 319. See, also, under (1) 31 Cyc. 358; (2) 8 Cyc. 180, 199; (3) 8 Cyc. 56, 58; (4) 8 Cyc. 170, 180, 181; (5) 8 Cyc. 58; (6) 38 Cyc. 167. As to who is a *bona fide* holder of paper and what are his rights, see 9 Am. Dec. 272; 44 Am. Dec. 698.

LAKE ERIE AND WESTERN RAILWAY COMPANY v VOLIVA.

[No. 7,815. Filed March 28, 1913.]

1. **APPEAL.**—*Waiver of Error.*—*Briefs.*—An assignment of error in overruling a demurrer to a complaint is waived by appellant's failure to argue such ruling in its brief or to point out any objections to the sufficiency of such complaint. p. 173.
2. **APPEAL.**—*Questions Reviewable.*—*Sufficiency of Paragraph of Complaint.*—*Recovery on Other Paragraph.*—The sufficiency of a particular paragraph of complaint will not be determined on appeal, where, from answers to interrogatories returned by the jury, and the admissions of the parties, it is shown that the verdict was based on another paragraph, since the error, if any, in overruling the demurrer was harmless. p. 173.
3. **RAILROADS.**—*Injury to Live Stock.*—*Failure to Maintain Fences and Cattle-Guards.*—*Complaint.*—*Sufficiency.*—A complaint against a railroad company to recover for injury to plaintiff's horses, which substantially follows the language of §5447 Burns 1908, Acts 1885 p. 224, imposing upon railroad companies the duty of constructing and maintaining fences and cattle-guards sufficient to prevent stock from getting on such railroads, is sufficient to charge a violation of the duty imposed by such statute. p. 174.
4. **RAILROADS.**—*Injury to Live Stock.*—*Complaint.*—*Evidence.*—*Admissibility.*—Where the complaint against a railroad company for injury to stock substantially followed the language of §5447 Burns 1908, Acts 1885 p. 224, so as to sufficiently charge defendant with a breach of its duty under such statute to construct and maintain fences and cattle-guards sufficient to prevent stock from getting on its tracks, any evidence was admissible which would prove or tend to prove a violation of such duty. p. 174.
5. **PLEADING.**—*Allegations of Complaint.*—*Evidentiary Facts.*—A complaint need not aver evidentiary facts in order that proof thereof may be admitted. p. 175.
6. **RAILROADS.**—*Injury to Live Stock.*—*Contributory Negligence.*—*Abandonment of Stock.*—The conduct of the owner of horses in undertaking, without help, while riding one horse and leading another, to drive horses over a railroad highway crossing, could

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no more than tend to prove contributory negligence, and did not indicate an abandonment of the horses so as to prevent a recovery for those that escaped over the cattle-guards and went upon the track where they were injured. p.175.

7. RAILROADS.—*Injury to Live Stock.—Defective Cattle-guards.—Contributory Negligence.*—Contributory negligence is not a defense in an action against a railroad company for injury to live stock resulting from defendant's failure to properly maintain cattle-guards. p.176.

8. RAILROADS.—*Injury to Live Stock.—Failure to Maintain Cattle-guards.—Application of Statute.*—The liability created by §5447 Burns 1908, Acts 1885 p. 224, requiring railroads to construct and maintain proper cattle-guards, is not limited to injury to stock led or controlled by halter or bridle. p.176.

9. RAILROADS.—*Injury to Live Stock.—Defective Cattle-guards.—Evidence.—Sufficiency.*—In an action for injury to horses alleged to have strayed onto defendant's railroad track through a defective cattle-guard, evidence that there was no pit under the guard, that the spaces between the rails or slats out of which it was made had become partly filled with gravel and cinders, that the beveled edges of the slats had become worn and beaten down, that snow had fallen on them two nights previous to the injury and had not been removed, that there was a well-beaten path over the guard on and over which the stock passed, and that defendant's track men passed over such guard but a short time before the stock passed over it and that they made no effort to clean the snow therefrom, warranted a finding that at the time the defendant was not maintaining and keeping such cattle-guard in the condition contemplated by §5447 Burns 1908, Acts 1885 p. 224, and that on account of such failure plaintiff's horses entered upon the track. p.176.

10. APPEAL.—*Findings.—Conclusiveness.*—Any evidence that will justify an inference of fact formed by the jury is enough to render unavailing, on appeal, the objection that such finding is not sustained by sufficient evidence. p.177.

11. APPEAL.—*Findings.—Conclusiveness.*—The jury's finding that plaintiff's horses were struck by defendant's train is conclusive on appeal if there was evidence to support such an inference by the jury. p.177.

12. APPEAL.—*Review.—Harmless Error.—Instructions.*—Objections to the giving or refusing of instructions, applicable to a paragraph of complaint upon which the verdict was not based, present no available error. p.177.

13. APPEAL.—*Review.—Harmless Error.—Refusal to Submit Interrogatory to Jury.*—The refusal to submit to the jury a requested interrogatory was harmless, where no answer that might have

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been made to it could have any controlling effect or influence in determining whether the answers to the interrogatories submitted should prevail against the general verdict. p. 178.

From Warren Circuit Court; *James T. Saunderson*, Judge.

Action by Robert Voliva against the Lake Erie and Western Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

John B. Cockrum, Stuart, Hammond & Simms and *E. G. Hall*, for appellant.

Daniel Fraser, Will Isham, Ernest M. Hawkins and *E. Burke Walker*, for appellee.

HOTTEL, J.—The judgment in this case was rendered on a complaint for damages for the killing of five horses. The complaint was in two paragraphs the first of which proceeded on the theory that appellant's "right of way, was not, on December 27, 1909, fenced in, neither was said railroad track on said day fenced in or otherwise enclosed, and on said day no barriers or cattle-guards had been or were then established or maintained at the public highway crossing where said railroad right of way and tracks crossed the public highway so as to prevent horses and other live stock from straying on the right of way from adjoining fields or from the public highway." This paragraph then avers that appellee's horses entered on the right of way "where no cattle-guards or other barriers were then and there established or maintained by defendant so that horses and other animals could not stray thereon"; that the defendant operated a freight train over that part of its right of way, after said horses had entered thereon and that the locomotive and cars of such train then and there "struck and killed said horses."

For the reasons hereafter indicated we need not set out the second paragraph. A demurrer to each paragraph of the complaint was overruled, to each of which rulings ap-

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pellant saved proper exceptions, and these rulings are each assigned as error and relied on for reversal. The cause was put at issue by an answer in general denial, and a trial by jury resulted in a verdict for appellee in the sum of \$950 with which verdict the jury returned answers to interrogatories. A motion for judgment on the answers to interrogatories was overruled, as was also a motion for a new trial, to each of which rulings an exception was properly saved by appellant, and the rulings on each of said motions are assigned as error and relied on for reversal.

While the ruling on the demurrer to the first para-

1. graph of complaint is assigned as error and relied on for reversal, this ruling has not been argued in appellant's brief and no objections of any kind are pointed out to the sufficiency of such paragraph. The error, if any, will therefore be deemed waived. Several objections

2. are urged against the second paragraph of complaint, but it is not necessary that we determine the question of its sufficiency for the reason that it is apparent from the answers to interrogatories returned by the jury, that the verdict is based on the first paragraph. In fact, both appellant and appellee, in effect, concede that this is true. It follows that no available error is presented by the assigned error which challenges the sufficiency of this paragraph to withstand the demurrer thereto. *Hill v. Pollard* (1892), 132 Ind. 588, 32 N. E. 564; *Miller v. Rapp* (1893), 135 Ind. 614, 34 N. E. 981, 35 N. E. 693; *Ervin v. State, ex rel.* (1898), 150 Ind. 332, 346, 48 N. E. 249; *Robinson v. Dickey* (1896), 143 Ind. 205, 42 N. E. 679, 52 Am. St. 417; *Lime City Bldg., etc., Assn. v. Black* (1894), 136 Ind. 544, 35 N. E. 829.

In support of its claim that the court erred in its ruling on the motion for new trial it is very earnestly insisted by appellant that the evidence is insufficient to sustain the verdict because of a variance between the averments of the first paragraph of complaint and the proof offered in its sup-

port, in that the complaint alleges that there was no fence or cattle-guard at the place where the stock entered upon the appellant's right of way and that the evidence offered in support of such averment showed that there was such a cattle-guard and at most only tended to prove that such guard was insufficient to turn stock. It will be seen

3. from the language of this paragraph above quoted that it substantially follows the statute which imposes upon railroad companies the duty of constructing *and maintaining* fences and cattle-guards sufficient to prevent stock from getting on such railroads, and is therefore sufficient, under such statute, and the authorities construing it and similar statutes to charge a violation of the duty imposed by such statute. §5447 Burns 1908, Acts 1885 p. 224; *Blanchard-Hamilton Furniture Co. v. Colvin* (1904), 32 Ind. App. 398, 69 N. E. 1032; *Pittsburgh, etc., R. Co. v. Newsom* (1905), 35 Ind. App. 299, 74 N. E. 21; *Wabash R. Co. v. Forshee* (1881), 77 Ind. 158; *Evansville, etc., R. Co. v. Tipton* (1885), 101 Ind. 197, 198; 3 Works' Practice (2d ed.) 27.

If the complaint be sufficient to charge a violation

4. of the duties imposed by such statute, and the authorities above cited so hold, it necessarily follows that any evidence would be admissible under such averments which would prove or tend to prove the violation of such duty. It is further insisted that evidence offered by appellee tending to show negligent delay on the part of appellant in the removal of snow from said cattle-guards on the morning the stock in question was killed, was outside the issues tendered by the complaint, and should not therefore be considered in determining the sufficiency of the evidence. As we have already indicated the statute here in question imposes not only the duty of erecting fences and cattle-guards in the first instance sufficient to turn stock, but it requires that they shall be maintained in a condition sufficient to turn such stock, and the paragraph of complaint in question not only avers that no barriers or cattle-guards had been

or were then established, but it also avers that they were not then “*maintained*” at said public highway crossing “so as to prevent horses and other livestock from straying upon the right of way.” The violation of the duty imposed by the statute and alleged in the complaint, consisted in the failure to erect and *maintain* the cattle-guard in such condition, that it would turn stock. The *condition* in which the cattle-guard was alleged to have been maintained was a material averment of the complaint and any evidence that tended

to prove such condition was admissible under such

5. averment. The existence of the snow and the delay in its removal were the evidentiary facts showing a cause for such condition and it was not necessary to aver such evidentiary facts in order that proof thereof might be admitted.

It is next insisted that the evidence shows that

6. the appellee voluntarily exposed his horses to a known danger and that he cannot for this reason recover on his first paragraph of complaint. Appellant bases this contention on evidence which showed that appellee, without any help, while riding a horse and leading another, undertook to drive the horses that were killed along with two or three others over the highway in question, and that his conduct in this respect indicated such an abandonment of his horses as will defeat a recovery in this case. The cases of *Fort Wayne, etc., R. Co. v. Woodward* (1887), 112 Ind. 118, 13 N. E. 260; *Knight v. Toledo, etc., R. Co.* (1865), 24 Ind. 402; *Welty v. Indianapolis, etc., R. Co.* (1886), 105 Ind. 55, 4 N. E. 410; and *Sinram v. Pittsburgh, etc., R. Co.* (1867), 28 Ind. 244, are relied on by appellant as supporting this contention. The facts of this case are unlike, and easily distinguishable from said cases. Appellant did not abandon his horses in this case. He accompanied them and while he did not have them under control by bridle or halter, his conduct in the matter of driving them over the highway in question, could no more than tend

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to prove contributory negligence which appellant
7. concedes is not a defense in this kind of an action.
Michigan, etc., R. Co. v. Farrell (1913), 52 Ind. App.
603, 99 N. E. 1026, and authorities there cited. It
8. must be apparent that the statute here involved was
not intended to be limited in its application to stock
led or controlled by halter or bridle.

It is further contended that evidence tending to show a
defective condition of the cattle-guard was limited to a
showing that two slats were defective and that they
9. were over next to the wing of the guard, at a point
where the horses did not, and could not have entered;
and the further showing that the guard was covered and
packed with snow which had fallen the night before the stock
was injured; that in other respects the cattle-guard was of
the kind generally maintained by good railroads. It is
urged that because the evidence and the answers of the jury
to interrogatories show that the horses did not pass over
said guard at the point where it contained said defective
rails and because the snow had so recently fallen that the
appellant could not be charged with negligent delay in its
removal from the cattle-guard that the evidence is insuffi-
cient to support the verdict. There was evidence showing
or tending to show that the guard in question was made of
wood; that there was no pit under it; that the spaces be-
tween the rails or slats out of which it was made had be-
come partly filled with gravel and cinders, that the beveled
edges of the slats had become worn and beaten down; that
snow had fallen not only on the night before the horses in
question were killed, but that snow had fallen the night
previous, and had not been removed; that on the morning
and at the time the horses passed over said cattle-guard
there was a well beaten track over it, on and over which
the horses passed; that some of appellant's track men had
passed over this same guard but a short time before the
horses passed over it, and that such track men made no effort

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to clean the snow therefrom. We think we have indicated enough of the evidence to show that there was some evidence which would warrant the jury in finding, as it did by its general verdict, that, at the time the horses in question passed over said guard, appellant was not then maintaining and keeping such guard in the condition contemplated by the statute under which this action is brought, and that on account of appellant's failure to discharge the duty imposed upon it by such statute, appellee's horses entered upon its railroad. Any evidence which would justify such

10. an inference by the jury is enough to meet and render unavailing, on appeal, the objections urged thereto by appellant. Appellant's contention in this regard is more than met and answered by this court in the case of *Pittsburgh, etc., R. Co. v. Newsom, supra*.

Finally it is contended that the evidence fails to show that appellant's engine or cars struck the horses alleged to have been killed. The evidence is by no means convincing or satisfactory on this point. Appellant's trainmen testified in effect, that the horses themselves ran over and off the abutment of appellant's bridge into the creek where they were found. On the other hand, the evidence

11. relating to the position of the horses in the creek, their injuries, and other physical facts is sufficient to authorize the inference that they were struck by appellant's engine or cars and knocked into the creek, and there being some evidence to support such inference, the verdict of the jury on such question is conclusive on appeal.

Objections are urged to some of the instructions given and refused, but these objections all relate either to instructions applicable to the second paragraph of complaint, or present in a different form questions already discussed, and for the reasons indicated we are of the opinion that no available error is presented in the giving or refusal of either of said instructions.

Objection is also urged to the refusal of the court
13. to submit an interrogatory propounded to the jury by
appellant. We are of the opinion that the court properly refused to submit such interrogatory but no answer that might have been made to it, could have any controlling effect or influence in determining whether the answers to such interrogatories should prevail against the general verdict and therefore no harm has resulted from a refusal to submit the same. We find no available error in the record.
Judgment affirmed.

NOTE.—Reported in 101 N. E. 338. See, also, under (1) 2 Cyc. 1014; 3 Cyc. 388; (2) 31 Cyc. 358; (3) 33 Cyc. 1262; (4) 33 Cyc. 1269; (5) 31 Cyc. 684; (6) 33 Cyc. 1232, 1242; (7) 33 Cyc. 1230; (8) 33 Cyc. 1163, 1170; (9) 33 Cyc. 1294, 1295; (10) 3 Cyc. 347, 348; (11) 3 Cyc. 348; (12) 38 Cyc. 1815, 1817; (13) 38 Cyc. 1910. As to a railroad company's duty to maintain fences and cattle-guards, see 21 Am. St. 289. On the question of the duty of a railroad company to keep cattle-guards in condition, see 36 L. R. A. (N. S.) 997. As to the measure of care of a railroad company to maintain fences once constructed, see 11 L. R. A. (N. S.) 228. For the liability of a railroad whose failure to maintain fences permits escape of livestock, which is killed or injured outside its right of way, see 29 L. R. A. (N. S.) 573. On the liability for injury to stock other than by trains, because of breach of statutory duty to fence, see 37 L. R. A. (N. S.) 1181.

MARKER v. TOWN OF ANDREWS.

[No. 7,864. Filed March 28, 1913.]

1. **APPEAL.—Review.—Special Findings.—Sufficiency.—Description of Real Estate.**—The special findings of the court in a proceeding to disannex certain lands from a town, in which a portion of petitioner's land was so erroneously described as to render the same impossible of location, are insufficient to support the conclusions of law and the judgment rendered thereon that a portion of petitioner's land be disannexed and refusing disannexation as to the remainder. p. 181.
2. **TRIAL.—Special Findings.—Sufficiency of Real Estate Descriptions.**—The rule that a description of real estate is insufficient, if an officer is unable to locate the land without the exercise of an arbitrary discretion, is applicable to the description of land in a special finding of facts rendered by the court. p. 183.
3. **APPEAL.—Review.—Special Findings.—Inferences.**—The court on appeal cannot indulge in inferences to aid special findings of fact. p. 183.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Petition by George Marker and others against the Town of Andrews, to disannex certain lands. From an adverse judgment, George Marker appeals. *Reversed.*

Fred H. Bowers and *Milo Feightner*, for appellant.

George H. Young, for appellee.

SHEA, J.—This was an action by appellant George Marker, together with C. R. Reiman and Max P. Morris, for the disannexation of certain tracts of land owned by them severally, situate within the corporate limits of the town of Andrews, described in a petition filed with the board of trustees of said town. A remonstrance was filed by certain taxpayers praying that the petition be not granted. The town board decided adversely to petitioners. The cause was appealed to the circuit court, where there was a trial on the issues formed before the town board on the petition and remon-

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strance. On proper request, the facts were specially found, and conclusions of law stated thereon by the court. Appellant filed a motion for a new trial assigning as reasons in support thereof that the finding of the court is not sustained by sufficient evidence and is contrary to law (stated in various ways), also that special finding No. 10 is not sustained by sufficient evidence and is contrary to law, which motion was overruled. In the conclusions of law the court specially found that the lands of petitioners C. R. Reiman and Max P. Morris should be disannexed from the corporation subject to certain accrued taxes. In conclusion of law No. 4 the court found that the lands of George Marker, except the lands described in finding No. 10, should be disannexed from the corporation subject to certain corporation taxes, and judgment was rendered accordingly. Appellant assigns as errors in this court: (1) Overruling of his motion for a new trial; (2) the court erred in its conclusions of law on the findings. Finding No. 1 describes the land of George P. Marker as follows: "The court finds that the petitioner, George Marker, is the owner of real estate as set out in the petition of said Marker and as described in the plat submitted with the petitioners' petition, and which said real estate is further more particularly described as follows, to wit:—The following real estate in Huntington County and State of Indiana, to-wit:—Being a part of Reserve No. 34, in Township 28 North Range 8 East, Commencing at a point on the line between Reserve 33 and 34 at the Northeast corner of the land of James Frame, on said line; thence running West to Loon Creek; thence down said Loon Creek in a Northeasterly direction, following the meanderings of said Loon Creek until it intersects the South line of the lands of M. and C. E. Knee; thence running East to the line dividing Reserve 33 and 34; thence running South on said line to the place of beginning, containing 53 Acres, more or less." Finding No. 10 reads as follows: "That

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the following described portion of the real estate of the petitioner George Marker, which real estate is described in Finding of Fact No. 1, is benefited by the improvements of the said corporate town of Andrews and is needed for the progress and development of the said corporate town of Andrews, to wit:—A strip of land along the East side of the said lands belonging to the said George Marker, which said strip of land is described as follows, to wit:—Beginning at the Southeast corner of the real estate of the said petitioner George Marker, as described in Finding No. 1, and running thence West to the West line of the highway, and thence Northward along the West line of said highway to the North line of said real estate; thence Westward on the North line of said real estate 278 feet; thence southward on a line parallel with the said East line to the South line of the said real estate; thence Eastward on said South line 278 feet to the place of beginning.” This finding contains what purports to be a description of land excepted in conclusion of law No. 4, and attempts to describe a tract of land which should be retained within the corporate limits of the town of Andrews. Conclusion of law No. 4 reads as follows: “4th. That the lands of the petitioner George Marker, except the lands described in Finding No. 10, should be disannexed from said corporation, subject to the corporation tax of said town thereon for 1909 and previous years.”

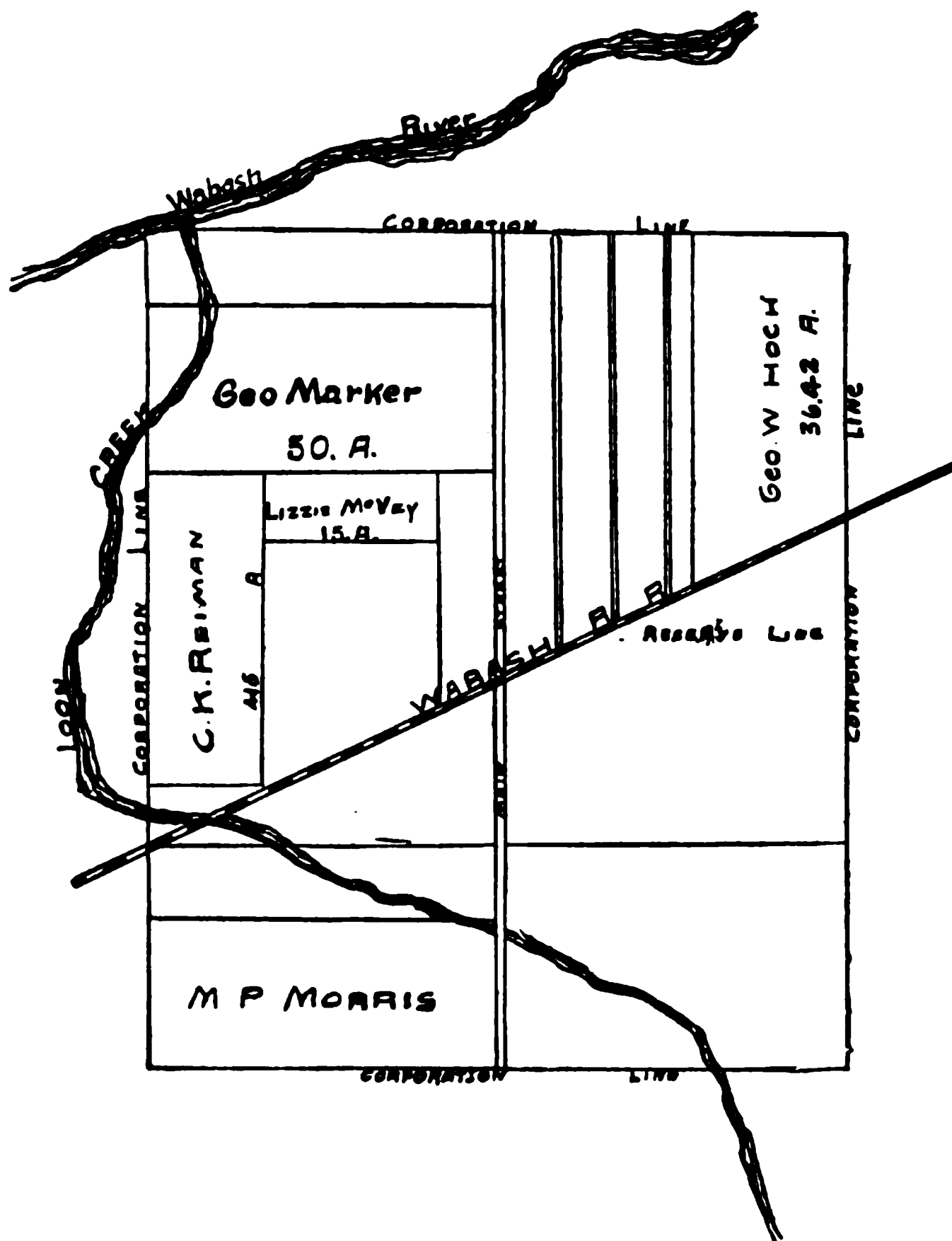
The description set out in special finding of fact No. 10 is wholly and completely defective, and does not describe
a strip of land along the east side of the lands of

1. George Marker as set out in special finding No. 1.

It is impossible for the court to determine from this description the location of the tract excepted in conclusion of law No. 4. The special findings of fact do not mention a public highway except as set out in finding No. 10. Appellant's testimony shows that his land was on the west side of the public highway leading north and south to an interur-

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ban station in the town of Andrews. The following plat introduced in evidence shows Main Street on the east side of appellant's land.



There is no evidence to show there was any other highway in or across said tract of land, yet special finding No. 10 states that the beginning point of the description is "the southeast corner of appellant's land", which must, of necessity be upon the west side of the public highway—running thence "*west to the west line of the highway*"—no distance given—thence "*northward along the west line of said high-*

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way," etc. The rule with respect to the sufficiency
2. of real estate descriptions must apply to cases of this character. In the case of *Diamond Plate Glass Co. v. Tennell* (1899), 22 Ind. App. 132, 52 N. E. 168, it is said: "In such cases, if an officer is unable to locate the land without the exercise of an arbitrary discretion, the description is insufficient. *College Corner, etc., Co. v. Moss* [1883], 92 Ind. 119; *Miller v. Campbell* [1875], 52 Ind. 125." The evidence probably would have warranted the trial court in finding that a strip of land 278 feet wide on the east side of the fifty-acre tract described in special finding No. 1 should not be disannexed, but the facts as found do not warrant this court in so holding. This court is not permitted
3. to indulge in inferences to supply material points omitted in special findings of fact. *Donaldson v. State, ex rel.* (1906), 167 Ind. 553, 78 N. E. 182; *Cleveland, etc., R. Co. v. Moneyhun* (1896), 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141, and cases cited; *Craig v. Bennett* (1897), 146 Ind. 574, 575, 45 N. E. 792, and cases cited; *Crowder v. Riggs* (1899), 153 Ind. 158, 162, 53 N. E. 1019; *Broadway v. Groenendyke* (1899), 153 Ind. 508, 512, 55 N. E. 434; *Citizens State Bank v. Julian* (1900), 153 Ind. 655, 676, 55 N. E. 1007; *Erwin v. Central Union Tel. Co.* (1897), 148 Ind. 365, 371, 46 N. E. 667, 47 N. E. 663; *Hill v. Swihart* (1897), 148 Ind. 319, 323, 47 N. E. 705; *Archibald v. Long* (1896), 144 Ind. 451, 454, 455, 43 N. E. 439; *Brunson v. Henry* (1898), 152 Ind. 310, 314, 52 N. E. 407.

The ends of justice can be best subserved by reversing the judgment in this cause with instructions to the lower court to sustain the motion for a new trial.

Ibach, C. J., Felt, P. J., Hottel, Adams, JJ., concur, Lairy, J., dissents.

DISSENTING OPINION.

LAIRY, J.—From the prevailing opinion in this case, I understand that the judgment of the trial court is reversed upon the sole ground that the description of the real estate contained in finding No. 10, is so imperfect, uncertain and indefinite that no judgment could be based thereon. No motion for a *venire de novo* was filed and the only errors assigned are, that the court erred in its conclusions of law based upon the findings, and that it erred in overruling appellant's motion for a new trial. By conclusion of law No. 4, the court stated as a matter of law that all of the lands of George Marker should be disannexed except that described in finding No. 10 and the judgment was entered accordingly.

Finding No. 10 is set out in the prevailing opinion and we refer to the description of the land excepted as therein contained. The location of the highway referred to therein is not shown in the finding. If it is located along the east line of the lands described as indicated in the prevailing opinion, and if the east line of appellant's land is the middle of the highway, the description set out in finding No. 10 is certainly sufficiently definite to enable a surveyor to locate the land intended. When considered in the light of this fact, the place of beginning would be in the middle of the highway at the southeast corner of appellant's land. The line set out in finding No. 10 as bounding the land in question begins at this point and runs thence west to the west side of the highway, thence north along the west line of the highway to the north line of the real estate, thence west 278 feet, thence south to the south line of said real estate, thence east to the place of beginning. The land thus bounded would include a strip of the uniform width of 278 feet off the east side of the lands of appellant lying immediately west of the highway.

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I am of the opinion that the lands were sufficiently described and that the judgment is not void for uncertainty. I can not, therefore, concur in the prevailing opinion.

NOTE.—Reported in 101 N. E. 335, 446. See, also, under (3) 38 Cyc. 1977, 1978.

BEARD, AUDITOR, v. THE PEOPLES SAVINGS BANK.

[No. 8,448. Filed March 28, 1913.]

1. **TAXATION.—Property Taxable.—Savings Banks.—Surplus.**—The surplus fund of a savings bank organized and conducted under the provisions of §§3348-3401 Burns 1908, §§2703-2757 R. S. 1881, Acts 1901 p. 155, Acts 1903 pp. 211, 321, viewed in the light of the statute, is held by the trustees of the bank in a *quasi* trust capacity, and is not taxable to the depositors, but, in view of the statutes on the subject of taxation in general, and those relating to the taxation of savings banks in particular, such fund is subject to taxation as against the bank. pp. 189, 190, 191.
2. **TAXATION.—Property Taxable.—Money.—Credits.**—Money is personal property and as such is subject to taxation under the provisions of §10143 Burns 1908, Acts 1891 p. 199, and under the same section all forms of indebtedness are personal property and subject to be taxed. p. 190.
3. **TAXATION.—Power to Tax.—Constitutional Law.**—The power to tax is inherent in the legislature, and §1, Art. 10 of the Constitution, making it the duty of the legislature to select the property subject to taxation and to prescribe regulations for its just valuation, is a limitation of that power. p. 190.
4. **TAXATION.—Property Taxable.—Statutes.**—Section 10142 Burns 1908, Acts 1891 p. 199, providing that all property within the jurisdiction of the State, not expressly exempted, shall be subject to taxation, is broad enough to include all forms of property whether real or personal. p. 190.
5. **TAXATION.—Policy of State.**—It is the settled policy of the State to subject all property to taxation except that which is by law exempt. p. 191.
6. **TAXATION.—Property Taxable.—Investments in Nontaxable Securities.—Surplus Funds of Savings Bank.**—Funds invested in nontaxable securities cannot be reached for taxation, so that the surplus fund of a savings bank, having authority to invest in such securities, thus invested on the first day of March in the year in which it was sought to be taxed, was not subject to taxation. p. 192.

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7. **TAXATION.—Power of State.—Capital Stock of National Banks.**—The capital stock of a national bank invested in government bonds is not subject to taxation as against the bank, although such fact may not affect the right of the State to tax the certificates or shares of stock in the hands of the stockholder. p. 192.
8. **PLEADING.—Complaint.—Demurrer.—Admissions.**—That certain funds in the possession of a bank constituted a part of such bank's deposits is admitted by the demurrer to a complaint which alleged such fact. p. 192.
9. **BANKS AND BANKING.—Deposits.—Relation of Bank and Depositor.—Taxation.**—Where a general deposit of cash is made, the bank, as a general rule, becomes the absolute owner of the cash and a debt from the bank in favor of the depositor arises for the amount of such deposit, thus creating the relation of debtor and creditor, but for the purposes of taxation, money deposited in a savings bank or other bank is regarded as the property of the depositor and taxable to him instead of to the bank. p. 193.

From Vanderburgh Circuit Court; *Curran A. DeBruler*, Judge.

Action by The Peoples Savings Bank against Charles P. Beard, auditor of Vanderburgh County, and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Hiram M. Logsdon, Albert J. Veneman, George A. Cunningham and Daniel Ortmeyer, for appellants.

James T. Walker, Henry B. Walker, Stuart, Hammond & Simms, H. J. Baker and Osborne, McVey & Osborne, for appellee.

Robinson & Stilwell, Amici Curiae.

LAIRY, J.—Appellee brought this action in the Vanderburgh Circuit Court to enjoin appellants as auditor and treasurer of the county from assessing and collecting certain taxes on its surplus fund and on the cash in the bank on March 1, 1911. A demurrer to the complaint was filed and overruled and the appellants, declining to plead further, judgment was rendered in favor of appellee perpetually enjoining the assessment and collection of such taxes.

The complaint discloses, in substance, that the plaintiff is and has been for many years a savings bank incorporated

under the laws of this State, and is situated at Evansville, Indiana. On March 8, 1911, the bank by its proper officers, presented to the township assessor, a tax schedule in which was stated the total amount of its personal property upon which according to its contention, it is required to pay taxes for the year 1911. This personal property consisted of banking furniture, file cases, safes and fixtures, valued at \$4,000. There was also assessed against the bank at this time real estate of the value of \$26,810. In July of the same year, the county board of review, upon a hearing, assessed against the bank in addition to the property described, the sum of \$21,000 which sum represented the amount of cash in the bank on March first. The bank appealed from this assessment to the State Board of Tax Commissioners, and a few days later, a citizen taxpayer of the county appealed to the same board from this assessment alleging that the bank owned a large surplus which was likewise taxable. On August 1, 1911, the State Board of Tax Commissioners sustained the assessment as made by the county board of review, and in addition thereto assessed the surplus of the bank in the sum of \$215,000. The complaint further discloses that the \$21,000 cash in the safe of the bank on March 1, 1911, was a part of the deposits of the bank and that the surplus fund was on said date all invested in bonds and securities which, by the law of the State of Indiana are exempt from taxation.

The objections to the sufficiency of the complaint are based solely upon the ground that one or both of these items were subject to taxation. We are thus called upon to determine whether the bank could be taxed upon either of such items. If it could the demurrer should have been sustained; but if it could not the demurrer was properly overruled.

Appellee was organized and is being operated as a savings bank under the act of May 12, 1869, and the amendments thereto. The act as amended is §§3348-3401 Burns 1908, §§2703-2757 R. S. 1881, Acts 1901 p. 155, Acts 1903 p. 211,

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Acts 1903 p. 321. Savings banks organized under the provisions of this statute have no capital stock and no stockholders. Their business is managed by a board of trustees who have no interest in the assets of the bank except to control, invest and manage such assets for the benefit of the depositors. The trustees have power to purchase, hold and convey real estate under certain prescribed conditions. The savings bank is authorized to receive deposits and invest the same in such securities as are specified by the act. All deposits shall be repaid to the depositor when required by him, but at such times, and with such dividends from profits, and under such regulations as the board of trustees may prescribe not inconsistent with the provisions of the act. Section 28 of the act (§3375 Burns 1908, §2730 R. S. 1881), makes it the duty of the board of trustees to provide a sinking fund by setting aside from the gross profits annually not less than one-half of one per cent of the deposits. This shall be continued until the sinking fund amounts to ten per cent of the deposits and it is lawful to accumulate such surplus until it shall amount to twenty-five per cent of the amount of all deposits held by such bank. This fund shall be invested and held to meet any contingency which may arise in the business of the bank and it cannot be used for the payment of dividends to depositors. All savings banks shall make up their accounts semi-annually on the first day of January and July of each year and all dividends and profits shall be divided, credited or paid to the depositors on or before the thirty-first day of January and July, respectively. In making these dividends it is the duty of the trustees to divide, as nearly as may be practical, all of the profits remaining after deducting the necessary expenses and the reserve for the surplus fund from the gross profits, but it is unlawful to declare any dividend, except from profits earned during the time for which such dividend is declared. If a residue of profits remains after making the dividends provided for, the accumulation of such undivided profits

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shall be distributed to the depositors as often as once in three years.

We have given the substance of those provisions of the act which in our opinion bear upon the question to be determined in this case. We shall first consider the tax-

bility of the surplus fund. When viewed in the light

1. of the statute, we think it is apparent that this fund is held by the trustees of the bank in a *quasi* trust capacity. It does not belong to the trustees and it does not belong to any particular depositor or class of depositors of the bank. The depositors of such a bank during any dividend period are entitled to share in the net profits earned during that period under such regulations with respect thereto as may have been adopted by the board of trustees, but they have no interest in the surplus fund by which they can compel distribution either as a dividend or otherwise. This fund must be preserved to meet any emergency which may arise in the business, and in case no emergency arises must be maintained so long as the bank continues to transact business. Upon the dissolution of the bank it would, no doubt, belong to the depositors, but whether it would be distributed to those who happened to be depositors at that time, or to all who have been depositors and entitled to dividends at any time while the bank was in existence, must be left to be determined when such a question is presented. It is apparent, we think, that the surplus fund in such a bank as this can not be taxed to the depositors, and that, if it is taxable at all, it must be taxed to the bank.

The Constitution of this State provides that, "The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be especially exempted by law." §1, Art. 10, Constitution of Indiana. The General Assembly

has enacted various statutes on this subject among which is the following section, "All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." §10142 Burns 1908, Acts 1891 p. 199.

2. Money is personal property and as such is subject to taxation under the provisions of §10143 Burns 1908, Acts 1891 p. 199, and under the same section, all forms of indebtedness are personal property and subject to be taxed. If, therefore, the surplus fund was in the hands of the trustees of the bank in cash, or if it were invested in notes or other evidence of indebtedness, not exempt, it would be subject to taxation provided the legislature has made provisions for the valuation and assessment of such property. The

power to tax is inherent in the legislature and the constitutional provision quoted in this opinion is a limitation of that power. It is thereby made the duty of the legislature to select the property subject to taxation and to prescribe regulations and methods for the just valuation of such property. *State Board, etc., v. Holliday* (1898), 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826. The statute quoted is broad enough to include all forms of

property whether real or personal, and the remaining question is, Has the legislature made provisions for the valuation and assessment of the sinking fund of savings banks? Sections 10233, 10234 Burns 1908, Acts 1891 p. 199, §§73, 74, provide for the assessment of certain domestic corporations among which are savings banks. The first

1. section provides that the president or other proper accounting officer of such corporation shall make out and deliver to the assessor a sworn statement. This statement is required to set forth certain facts among which is the value of the tangible property. The following section provides that this schedule shall be laid before the board of review at its annual meeting and shall be considered in making the assessment against such corporation. The sec-

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tion further provides that, in cases where the capital stock exceeds in value the tangible property listed for taxation, such capital stock shall be liable to taxation for such excess of value, but, where the capital stock or any part thereof is invested in tangible property returned for taxation, such capital stock shall not be assessed to the extent that it is so invested. These provisions clearly indicate that the tangible property of such corporations shall be assessed, but that where capital stock exists and a part or all of such capital is invested in tangible property, such capital stock shall not be assessed to the extent that it is so invested. It is apparent, we think, that the provisions of this section in reference to the assessment of capital stock can have no application to savings banks which have no capital, but that the provisions as to the assessment of tangible property does apply

to such banks. It is the settled policy of this State

5. to subject all property to taxation except that which is by law exempt. *State, ex rel., v. Real Estate, etc., Assn.* (1898), 151 Ind. 502, 51 N. E. 1061. The cap-

1. ital stock in banks and trust companies is not taxed as such, but the shares of stock which represent such capital is assessed to the shareholder thereof in the township, city or town where such bank or trust company is located. §§10208, 10209 Burns 1908, Acts 1907 p. 624. The next following section (§10210 Burns 1908, Acts 1907 p. 624), requires the county board of review to fix the true cash value of each of said shares of stock and that in doing so, it shall take into consideration the capital, surplus, undivided and individual profits, if any, as shown by the statement under oath which this section requires to be made out and delivered to the assessor for the use of the county board of review. This shows that it is the policy of the State to subject to taxation the sinking fund and undivided profits of banks having a capital stock, and, in view of our statutes on the subject of taxation in general and those relating to taxation

of savings banks in particular, we can see no reason for holding that the surplus fund in a savings bank stands upon any different footing.

Under the averments of the complaint the surplus of the savings bank was not subject to taxation on March 1, 1911,

for the reason that it was, on that date, invested in

6. its entirety in municipal bonds and other nontaxable securities. The bank having this fund under its control was given authority by statute to invest it in this kind of security. §§3375, 3366 Burns 1908, §2730 R. S. 1881, Acts 1903 p. 211. When a fund is invested in securities of this character, it is no longer taxable as cash; and, as the securities are exempt, the fund cannot be reached for taxation.

Appellant cites a number of cases to sustain the proposition that the right of a state to tax shares of stock in a national bank is not affected by the fact that the cap-

7. ital of such bank is all invested in government bonds.

Wright v. Stilz (1866), 27 Ind. 338; *People v. Bradley* (1866), 39 Ill. 130; *City of Utica v. Churchill* (1865), 33 N. Y. 161. There is a difference between taxing the shares, or certificates of stock in the hands of a stockholder, and taxing the capital of the bank, as such, to the corporation. The certificate of stock belongs to the stockholder, but the capital stock is the property of the corporation. The capital stock of a national bank invested in government bonds is not subject to taxation as against the bank. *People v. Commissioners, etc.* (1863), 2 Black 620, 17 L. Ed. 451; *Bank Tax Case* (1864), 2 Wall. (U. S.) 200, 17 L. Ed. 793; *State, ex rel. v. Rogers* (1883), 79 Mo. 283; *Ottumwa Savings Bank v. City of Ottumwa* (1895), 95 Iowa 176, 63 N. W. 672.

The question as to whether the bank should be taxed for the cash in its possession on March 1, 1911, remains to be considered. The demurrer admits that

8. this cash constituted a part of the bank's deposit.

This cash was subject to taxation and the only ques-

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tion is whether it should be taxed to the bank or to the depositor or to both. As between a bank and a depositor, the

general rule is that a general deposit of cash creates

9. the relation of debtor and creditor. The bank becomes the absolute owner of the cash and a debt from the bank in favor of the depositor arises for the amount of such deposit. *McLain v. Wallace* (1885), 103 Ind. 562, 5 N. E. 911; *Fletcher v. Sharpe* (1886), 108 Ind. 276, 9 N. E. 142; *Union, etc., Trust Co. v. Indianapolis Lounge Co.* (1898), 20 Ind. App. 325, 47 N. E. 846.

Appellant asks us to apply this rule as between the taxing officers on the one hand and the bank and its depositors on the other, and to hold that the cash deposited is the absolute property of the bank for taxation purposes and that as such it should be taxed to the bank. It is undoubtedly the law that money on deposit is taxable to the depositor. That such was the intention of the legislature is made clear by §10202 Burns 1908, Acts 1891 p. 199, which provides a form of schedule for personal property for purposes of taxation. The schedule of chattels has for its first item, "Money on hand or on deposit." This indicates that money on deposit is to be treated for taxation purposes as the property of the depositor the same as money on hand. The same schedule also indicates that for the purpose of taxation the deposit of money is not regarded as creating a debt due the depositor from the bank. If it were so regarded, it would be required that such deposits be set out in the former part of the schedule headed, "Personal Property—Credits." In this part of the schedule the taxpayer is required to set out all forms of indebtedness due him from others and from the aggregate amount of such credits he is permitted to deduct his *bona fide* indebtedness. From this schedule, it is apparent, we think, that the legislature treated deposits in banks, for taxation purposes, as chattels of the depositors and not as credits due them. In Nebraska it has been ex-

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pressly decided that a depositor in a bank cannot, in listing his property for taxation, treat his deposit as a credit due him from the bank, and that he cannot deduct from such deposit the amount of his *bona fide* indebtedness. *Critchfield v. Nance County* (1906), 77 Neb. 807, 110 N. W. 538. In most jurisdictions where the question has arisen it has been held that money on deposit in banks is taxable to the depositor and not to the bank. *Branch v. Town of Marengo* (1876), 43 Iowa 600; *Commonwealth v. Wathen* (1907), 126 Ky. 573, 104 S. W. 364; *Critchfield v. Nance County*, *supra*; *Campbell v. Wiggins* (1892), 2 Tex. Civ. App. 1, 20 S. W. 730.

In view of the conclusion we have reached, the other questions discussed by counsel need not be considered. The trial court did not err in overruling the demurrer to the complaint.

Judgment is affirmed.

NOTE.—Reported in 101 N. E. 325. See, also, under (1) 37 Cyc. 828; (2) 37 Cyc. 783; (3) 37 Cyc. 715; (4) 37 Cyc. 773; (5) 37 Cyc. 767, 773; (6, 7) 37 Cyc. 880; (8) 31 Cyc. 333; (9) 37 Cyc. 828. As to classification of property for the purpose of taxation, see 62 Am. St. 175. As to such transactions with a bank as are deemed to be deposits, see note to *Long v. Straus* (Ind.), 57 Am. Rep. 97. The question of state taxation of capital of national banks is treated in 3 L. R. A. (N. S.) 584.

HOLTZ ET AL. v. MERCANTILE TRUST AND SAVINGS COMPANY, ADMINISTRATOR, ET AL.

[No. 7,780. Filed January 9, 1913. Rehearing denied
March 28, 1913.]

- 1 APPEAL.—*Record*.—*Precipe*.—Only such papers and entries as are designated in the *precipe* are a part of the record on appeal. p. 198.
- 2 APPEAL.—*Record*.—*Bill of Exceptions*.—*Precipe for "Original Copy"*.—Where the *precipe* directed the clerk to insert in the transcript the "original copy of the bill of exceptions," and the clerk's certificate shows that "the original bill of exceptions" is

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incorporated into the transcript, the bill of exceptions is properly in the record under §657 Burns 1908, Acts 1897 p. 244, since it is apparent that the precipe called for the original bill of exceptions and not for a copy of such original bill. p. 199.

3. EXECUTORS AND ADMINISTRATORS. — *Appointment. — Review. —*

While §2737 Burns 1908, Acts 1901 p. 281, is mandatory in its provision that the widow or next of kin of a decedent, if qualified, shall be appointed as administrator if application for such appointment is made within twenty days from the death of the decedent, after the lapse of such twenty days, if no appointment has been made and a necessity therefor exists, the court is given a discretionary power by subd. 4 of said section to appoint any competent person of the county, and the exercise of such power will not be disturbed on appeal unless there has been a clear abuse thereof. p. 199.

4. EXECUTORS AND ADMINISTRATORS. — *Appointment. — Rights of*

Creditors.—A creditor of a decedent's estate has a right to demand that an administrator shall be appointed and that the estate shall be settled in the mode prescribed by statute, even though there may be no great necessity for such appointment. p. 200.

5. EXECUTORS AND ADMINISTRATORS. — *Appointment. — Annulment of*

Letters.—The fact that the heirs of a decedent, after the appointment of an administrator for his estate, paid the amount of a judgment, the only debt of decedent, into the court in which it had been rendered, could not operate to take from the court appointing the administrator the power to make such appointment, or compel the annulment of the letters issued, but was a fact for the consideration of such court in the exercise of its discretionary power. p. 200.

From Vanderburgh Circuit Court; *A. C. Hawkins*, Judge *Pro Tem*.

Action by Louisa Holtz and others against the Mercantile Trust and Savings Company, administrator with the will annexed of the estate of Ferdinand Holtz, deceased, and another. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

DeWitt Q. Chappell, for appellants.

Joel E. Williamson, for appellees.

FELT, J.—This is a proceeding brought by the appellants to set aside the appointment of the appellee, Mercantile

Trust and Savings Company as administrator with the will annexed of the estate of Ferdinand Holtz, deceased, and to revoke the letters of administration issued to it. The appeal has heretofore been dismissed as to Joel E. Williamson, who was joined as an appellee.

The facts material to the questions in issue, are in substance as follows: Ferdinand Holtz died testate at Vanderburgh County, State of Indiana in October, 1907, and his will was duly admitted to probate. Prior to his death a judgment was rendered against him in the Warrick Circuit Court for the sum of \$1,297.45 in favor of one J. Wilfred Gaidry, from which judgment an appeal was taken to the Supreme Court. The cause was thereafter transferred to this court and in the year 1910, the judgment was affirmed. Said Ferdinand Holtz owned and conducted a foundry in the city of Evansville and while said appeal was pending said business was incorporated under the name of "The F. Holtz Company" and was owned and operated by said Holtz and his children; that said corporation assumed the payment of said judgment; that on March 8, 1910, after said judgment had been affirmed, one Breidenbach began suit against said Gaidry in the Warrick Circuit Court and caused a writ of attachment and garnishment to be issued and served upon the "F. Holtz Company" and the widow and children, heirs at law of said Ferdinand Holtz, deceased, and the bondsmen of said Holtz in said appeal, for the purpose of securing the application, upon a debt alleged to be due from said Gaidry, of the amount due from said Holtz upon the aforesaid judgment; that on March 12, 1910, one Joel E. Williamson who was the attorney for said Gaidry, filed in the Vanderburgh Circuit Court an application for the appointment of an administrator of the estate of said Ferdinand Holtz, deceased, and in his petition alleged that said decedent died at said county in 1907, leaving a personal estate of the value of \$2,500; that said judgment of \$1,297.45 was unpaid; that said Williamson filed and held a lien upon

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said judgment for the sum of \$500 for attorney's fees; that there has been no administration or settlement of said estate; that said judgment had been assigned to one Cadiere. Prayer that the court appoint an administrator; that thereupon the court on said day appointed the appellee, Mercantile Trust and Savings Company as administrator with the will annexed of the estate of said Holtz, deceased; that on March 22, 1910, appellants filed in the Vanderburgh Circuit Court their petition to revoke the letters and set aside the appointment of said administrator and in said petition averred that the will of said decedent had been duly probated and thereafter the widow and children of said decedent (all of full age) made a family settlement of all the business, property and estate of said decedent and paid in full all the debts of said estate except said judgment; that said decedent in his lifetime appealed from said judgment and gave a bond for the payment thereof to the approval of the court; that said bond was good and solvent and the sureties thereon are still solvent; that after the affirmance of said judgment such proceedings were had in the Warrick Circuit Court in the pending suit aforesaid, that the amount due upon said judgment from said Ferdinand Holtz, deceased, was fixed at \$1,562.54, and on March 21, 1910, that amount was paid to the clerk of the Warrick Circuit Court by said garnishee defendants to be held by the clerk until the further order of the court, pending the determination of the proceedings of said Breidenbach against said Gaidry; that appellants offered to pay and stood ready to pay any costs which the court should adjudge due from them; that said widow and her son, Henry Holtz, reside in Vanderburgh County, in the State of Indiana, are over twenty-one years of age and competent to act as administrator with the will annexed of said estate; that there is no necessity or occasion for the appointment of any administrator, but if the court should decide that one should be appointed, they ask that the letters issued to appellee be annulled and that letters be

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issued to said Henry and Louisa Holtz. The court, after hearing the testimony, found for the appellee and against the appellants and refused to annul the letters of administration with the will annexed issued to appellee, to which the appellants duly excepted and it was thereupon adjudged that the further proceedings in said estate be stayed pending this appeal.

The appellants filed a motion for new trial in which they alleged among other things that the finding and decision of the court was not sustained by sufficient evidence; that the decision of the court was contrary to law; that the court erred in granting letters of administration with the will annexed to appellee and also erred in refusing to grant letters of administration with the will annexed to said Louisa and Henry Holtz; that there was not at the time of the issuing of said letters nor is there now any necessity or reason for the issuance of letters upon the estate of said Holtz, deceased. This motion was overruled, an appeal prayed and granted and error assigned under twenty-four specifications. The assignment of errors is sufficient to present the question of the alleged error of the court in appointing appellee and in refusing to set aside said appointment and to appoint the said son and widow as administrators with the will annexed of the estate of said decedent.

Before passing upon the questions raised by the assignment of errors, we note the contention of the appellee that the bill of exceptions containing the evidence is not in the record. The precept directed the clerk "to insert in the transcript the original copy of the bill of exceptions" and the clerk's certificate shows that "the original bill of exceptions" is incorporated into the transcript. It is insisted by appellee that the precept calls for a copy and the certificate shows that the original bill of exceptions is certified to this court. Only such papers and entries as are

1. designated in the precept are a part of the record on appeal. *Johnson v. Johnson* (1901), 156 Ind. 592, 60

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N. E. 451; *Mankin v. Pennsylvania Co.* (1903), 160 Ind. 447, 451, 67 N. E. 229; *Berry v. Chicago, etc., R. Co.* (1902), 158 Ind. 668, 64 N. E. 82. By §657 Burns 1908, Acts 2. 1897 p. 244, the original bill of exceptions containing the evidence is sufficient on appeal when duly certified and the only question here is whether the precept calling for "the original copy" means a copy or the original. The use of the word "copy" in this connection is not commendable as tending to clearness of expression, but considered in connection with the word "original" we think it is apparent that the precept calls for the original bill of exceptions containing the evidence and not for a copy or secondary instrument made from the original. Furthermore Acts 1903 p. 338, §7, §667 Burns 1908, authorizes the use of either the original or a copy.

The petition to set aside the appointment of appellee and annul the letters issued to it, and requesting the appointment of the widow and son of the decedent, shows that a family settlement had been made; that all the debts of the deceased had been fully paid except the judgment in favor of Gaidry, the payment of which had been provided for; that since the appointment of appellee the amount of said judgment had been paid to the clerk of the Warrick Circuit Court. It also appears that at the time of appellee's appointment more than two years had expired since the death of Ferdinand Holtz, deceased. The petition does not allege that Louisa and Henry Holtz are named in the will as executors, legatees or in any capacity whatever. It is averred that said Louisa is the widow, and said Henry and their coappellants are the children and only heirs at law of said decedent.

It is apparent that on the facts alleged their right to appointment, if any they have, depends on §2742 Burns 1908, Acts 1901 p. 281, and not on the section relating

3. to executors named in the will (§2737 Burns 1908, §2222 R. S. 1881), or to residuary and specific legatees (§2741 Burns 1908, §2226 R. S. 1881). Where the widow

or next of kin applies for letters of administration within twenty days from the death of the decedent, and shows proper qualifications, the statute is mandatory and the court has no discretionary power, but after the lapse of twenty days any competent person of the county may be appointed when there is any necessity for administration. *Bowen v. Stewart* (1891), 128 Ind. 507, 514, 26 N. E. 168, 28 N. E. 73; *Hayes v. Hayes* (1881), 75 Ind. 395, 397. But subd. 4, §2742, *supra*, gives the court discretionary power after twenty days have elapsed from the death of the decedent, and an appointment thereafter made, where any necessity therefor is shown, will not be disturbed on appeal unless there has been a clear abuse of the power of the court in making such appointment, or in refusing to set the same aside. *Shrum v. Naugle* (1899), 22 Ind. App. 98, 53 N. E. 243; *Wallis v. Cooper* (1890), 123 Ind. 40, 23 N. E. 977; *Andis v. Lowe* (1894), 8 Ind. App. 687, 34 N. E. 850; *Toledo, etc., R. Co. v. Reeves* (1894), 8 Ind. App. 667, 35 N. E. 199. From our

4. viewpoint there does not seem to have been any great necessity for appellee's appointment. However, the undisputed fact remains that a debt of the decedent was outstanding and unpaid when the appointment was made. In *Bowen v. Stewart, supra*, on page 516, the court said: "So long as there are debts against the estate the heirs cannot maintain an action to recover the assets. So, too, so long as there is a single creditor he has a right to demand that the estate shall be settled in the mode prescribed by the statute, and that the person handling the assets shall give bond securing the proper application of the funds that may come into his hands." The trial court after a

5. full hearing, refused to set aside the appointment of appellee and to make any other appointment. The family settlement, the provision for the payment of the judgment in question, or its payment after appellee was appointed, could not operate to take from the court the power to make the appointment or compel the annulment

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of the letters issued. In exercising its discretionary power the court could consider such facts, but having done so and sustained the original appointment and refused to appoint the widow and son of decedent on their later application, we cannot say the court abused its power or that its decision was without warrant of law.

Judgment affirmed.

NOTE.—Reported in 100 N. E. 398. See, also, under (1) 2 Cyc. 1053; (2) 3 Cyc. 98; (3) 18 Cyc. 84, 125; (4) 18 Cyc. 119; (5) 18 Cyc. 152. As to removal of executors and administrators and the grounds therefor, see 138 Am. St. 525.

HUFFMAN v. HUFFMAN.

[No. 7,956. Filed April 1, 1913.]

1. DIVORCE.—*Alimony.—Amount.—Matters to be Considered.*—Where a husband and wife were tenants by entireties of real estate purchased and paid for by the husband, it was proper for the court, in granting a divorce and fixing the alimony, to consider such fact and that the wife upon the granting of the divorce became the owner of an undivided one-half of such real estate. p. 202.
2. DIVORCE.—*Alimony.—Amount.—Matters to be Considered.*—For the purpose of determining the amount of alimony to be given in any case, the court may inquire into the circumstances of the parties, ascertain the amount of property owned by the husband, the source from which it came, the ability of the husband to pay, by reason of his financial condition, as well as his income and ability to earn money. p. 202.
3. DIVORCE.—*Alimony.—Review.*—The amount of alimony allowed in each case rests largely in the discretion of the trial court, and, unless it appears that the court abused its discretion in awarding alimony, the judgment will not be reversed on appeal. p. 202.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by *Arbie M. Huffman* against *Milton W. Huffman*. From a judgment for plaintiff, the plaintiff appeals. *Affirmed.*

Watkins & Butler, for appellant.

Fred H. Bowers and *Milo N. Feightner*, for appellee.

ADAMS, J.—Appellant, on her own petition, was granted a divorce from appellee. She was given judgment for alimony in the sum of \$50, an allowance of \$40 counsel fees, and \$4 per month for the support of her infant son. The overruling of appellant's motion to modify the judgment for alimony, by increasing the amount thereof, is the only question presented for review. The evidence as to the amount and value of appellee's property is indefinite and unsatisfactory. This is also true of appellee's income and ability to earn money. His personal property is shown to be worth but little more than his debts and the allowance

and judgment made and rendered in the cause. Ap-

1. pellant and appellee, as tenants by entireties, are shown to own real estate of the probable value of \$1,500, which was purchased by appellee and paid for out of his earnings. By the granting of the divorce, appellant became the owner of the undivided one-half of this real estate. It is apparent that the court considered this fact in fixing the amount of alimony, and it was a proper fact to be taken into consideration.

By §1083 Burns 1908, §1044 R. S. 1881, it is made the duty of the court, on granting a divorce, to make such decree for alimony as the circumstances of the case

2. shall render just and proper. The determination of each case must "depend upon its own circumstances and an enlightened sense of justice and public policy." *Hedrick v. Hedrick* (1867), 28 Ind. 291, 294. And for the purpose of determining the amount of alimony to be given in any case, the court may inquire into the circumstances of the parties, ascertain the amount of property owned by the husband, the source from which it came, the ability of the husband to pay, by reason of his financial condition, as well as his income and ability to earn money.

Rariden v. Rariden (1904), 33 Ind. App. 284, 286, 70

3. N. E. 398, 104 Am. St. 252. The amount of alimony allowed in each case rests largely in the discretion

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of the trial court, and, unless it appears that the court abused its discretion in awarding alimony, the judgment will not be reversed on appeal. *Woodburn v. Woodburn* (1911), 47 Ind. App. 696, 95 N. E. 268.

The record before us does not show that the trial court abused its discretion. Judgment affirmed.

NOTE.—Reported in 101 N. E. 400. See, also, under (1) 14 Cyc. 771, 773; (3) 14 Cyc. 773, 803. As to alimony and the decree allowing it, see 102 Am. St. 700. On the question of husband's prospects as basis for alimony, see 4 L. R. A. (N. S.) 909. For a discussion of the proper proportion of a husband's estate to be awarded to the wife as permanent alimony, see Ann. Cas. 1913 A 803.

NORTH v. JONES.

[No. 7,595. Filed December 12, 1912. Rehearing denied April 1, 1913.]

1. **APPEAL.—Briefs.—Sufficiency.—Waiver of Errors.**—Although appellant's failure to properly present in his brief certain errors assigned amounts to a waiver of such errors, such failure will not render the brief insufficient so as to prevent a consideration of questions arising on other errors and which are therein properly presented. p. 206.
2. **BOUNDARIES.—Monuments.—Government Surveys.**—The original stakes or monuments set by the government surveyors to establish section points control if existing, but if lost the points must be determined from other evidence and the location as thus determined will be controlling. p. 207.
3. **TRIAL.—Instructions.—Province of Jury.—Weight of Evidence.**—In an action of ejectment in which a material question for determination was the location of the stone marking the northeast corner of the section, an instruction that evidence was introduced tending to establish a prolongation of the line from the northwest corner to the middle section corner and thence to the east line, which tended to show that such line would be 6½ feet north of the fence built by defendant at the northwest corner of plaintiff's land and 12.62 feet north of the post at the east end of such fence, and stating that if the jury believed said line to be the north line of the section its verdict should be for plaintiff, gave undue prominence to such evidence, in view of the fact that

there was other evidence differing as to the location of such line, and invaded the province of the jury. p. 210.

4. **BOUNDARIES.—Presumptions.—Straight Lines.—North Section Lines.**—In view of the method employed by the government surveyors in establishing the north line of a section in the tier of sections immediately west of the range line, it may be presumed that such a line is a straight line, but such presumption may be rebutted by the evidence. p. 210.
5. **EVIDENCE.—Judicial Notice.**—The court takes judicial notice of the rules governing the survey of public lands. p. 211.
6. **EVIDENCE.—Burden of Proof.—Presumptions.**—Where a party has the burden of proof upon a given issue and a rebuttable presumption arises in his favor, either as a result of evidence introduced or from facts judicially known by the court, such presumption will prevail in his favor until it is met and rebutted by evidence, but, while in such case the burden of going forward with the evidence devolves upon his adversary, the burden of the issue does not shift. p. 212.
7. **EVIDENCE.—Preponderance.—Burden of Proof.—Presumptions.**—The duty of producing a preponderance of the evidence upon a given issue always rests upon the party having the affirmative of such issue, and the burden of proof cannot be changed or shifted by any presumption that may arise during the introduction of the evidence. p. 212.
8. **TRIAL.—Instructions.—Burden of Proof.—Misleading Jury.**—An instruction stating that the burden of showing that a section line is not a straight line is upon the party who claims that the line was not straight in fact, and if the evidence as to the line being straight or otherwise, is of equal weight, the presumption that the line was straight would not be overthrown, was obscure and misleading. p. 213.
9. **BOUNDARIES.—Section Lines.—Evidence.—Other Surveys.**—Where, in an ejectment proceeding, the location of the eastern terminus of the north line of a certain section of land, which was bounded on the east by the range line, was an essential point in dispute, evidence relating to the survey of the range line was admissible. p. 214.
10. **TRIAL.—Instructions.—Weight of Evidence.—Province of Jury.**—It is not the province of the court to advise the jury as to the weight or value of evidence, and an instruction which indicates that a particular class of evidence is to be given greater weight than other evidence, is erroneous as invading the province of the jury. p. 214.
11. **BOUNDARIES.—Evidence.—Instructions.—Province of Jury.**—In an action involving the location of a boundary line, an instruction that fences of long standing erected upon what parties

have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared, is erroneous as misleading the jury. p. 215.

12. **APPEAL.—Review.—Harmless Error.—Instructions.**—An instruction which told the jury that the defendant had admitted of record that a certain stone marking a section corner was correctly located, by the statement that no evidence would be introduced to dispute its location, was erroneous, but was harmless in view of the fact that at the time the statement was made some evidence had already been introduced tending to show that such stone was correctly located. p. 215.

13. **EVIDENCE.—Admissions.**—The statement made by defendant's attorney that no evidence would be introduced to dispute the location of certain corner stones did not amount to an admission that such stones were correctly located. p. 215.

14. **BOUNDARIES.—Location of Section Corners.—Instructions.**—An instruction which told the jury that if it found that the point at which the north line of section 18 intersected the range line was marked and recorded and undisputed as the original government corner, it might consider its location in determining where the east corner of section 13 was located, was incorrect, since the jury had a right to consider such stone if it found that it did in fact mark the northwest corner of section 18 as located by the government survey, and the instruction inferentially denied such right unless the jury found that such stone was marked and undisputed as the original government corner. p. 216.

From Randolph Circuit Court; *John W. Macy*, Special Judge.

Action by Ebenezer S. Jones against William North. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Smith & Moran, Henry Eichhorn and Caldwell & Parry, for appellant.

Snyder & Smith, for appellee.

LAIRY, J.—This action was brought by appellee as plaintiff to eject appellant from a small parcel of land described in the complaint consisting of about .43 of an acre. At the time of the commencement of the action the plaintiff owned the east half or the northeast quarter of section 13, township 23 north, range 13 east. The defendant owned

the southeast quarter of section 12 in the same township and range and, also, the east half of the southwest quarter of said section. Both sections 12 and 13 are bounded on the east by the range line. It thus appears that for a distance of eighty rods west from the range line, the north line of plaintiff's land forms the south line of the lands of the defendant. The land in controversy as described in the complaint consists of a strip 80 rods in length, extending west from the range line and being 19.1 feet in width at the east end and 9.5 feet in width at the west end. According to the averments of the first paragraph of complaint this strip is located immediately south of and bordering on the line between section 12 and section 13, and according to the averments of the second paragraph it is located independently of the section line and may be in either section, or partly in both. There was a verdict and judgment for plaintiff and defendant prosecutes this appeal.

Appellee contends that the brief of appellant is not sufficient under the rules of this court to present any question

for decision. It is true that appellant has waived

1. some of the errors assigned by failing to present them properly in his brief; but the action of the court in overruling appellant's motion for a new trial is assigned as error, and some of the questions arising thereunder are properly presented and argued in the brief and these will be considered. The questions thus presented relate principally to the instructions. An intelligent discussion of the correctness and applicability of these instructions requires a brief statement of some of the facts as disclosed by the evidence. At the time this controversy arose, the stake set by the government surveyors to mark the northeast corner of section 13 had been obliterated and the location was lost, and the line extending west therefrom to the north quarter corner of section 13 was in dispute. Appellant, before the suit was commenced built a wire fence commencing at the range line near a stone known as the

“Current Stone” which, as he claimed, marked the northeast corner of section 13, and extending west a distance of 40 rods upon what he claimed to be the section line and the southern boundary of his land. It seems to be conceded that this fence and a line extended west therefrom and on a line therewith, mark the southern boundary of the land in dispute.

One of the questions of fact to which the evidence related was the location of the northeast corner of section 13 as fixed by the government survey and also the location of the line extending therefrom to the north quarter corner of section 13, appellant claiming that the “Current Stone” marked the corner and that the fence erected by him was on the line, while appellee contended that the true corner was located some distance north of said stone and that the section line extended therefrom in a westerly direction to the north quarter corner of section 13. The northeast corner of section 13 as fixed by the government survey, marks the eastern terminus of the east half of such line, the north quarter corner marks its eastern terminus and a straight line connecting these two points marks the east one-half of said section line, the location of which is in controversy in this case. If the original stakes or monuments set

2. by the government surveyors to mark these two points can be found they control, but if one or both of such monuments are obliterated or lost the point of the former location of such monument or monuments must be determined from the evidence, and when so determined such points will mark the terminations of such line and will be controlling. In the making of government surveys the township lines and the range lines are first run. The range lines are run north and south six miles apart, and the township lines are run east and west a like distance apart, thus dividing the State into congressional townships of thirty-six sections each. When these range lines are surveyed, section corner posts are placed and properly wit-

nessed at intervals of one mile, and quarter corners are also set and witnessed at points between the section corners and one-half mile distant therefrom. The section corners and the quarter corners so fixed in the survey of the range line constitute the corners and the quarter corners of the tier of sections immediately to the west of such range line. Sections 13 and 12 in which the lands of appellant and appellee are located are situated in the tier of sections immediately west of the range line, and the stake marking the northeast corner of section 13 and the southeast corner of section 12 was therefore located by the survey of the range line.

The regulations of the Department of the Interior, which have the force of law, do not permit the interior subdivisions of the congressional townships to be made by the same surveyor who runs the township and range lines, and such interior subdivisions are made at a subsequent time and by a different surveyor. In making this subdivision the surveyor began at the southeast corner of the township and surveyed the east tier of sections first proceeding north. The south line of section 13 would thus be fixed by the survey of the north line of the section immediately to the south, and the stake set at the northwest corner of such section to the south would mark the southwest corner of section 13. In surveying section 13 the government surveyor would begin at the stake set to mark the northwest corner of the section immediately to the south and run north parallel to the range line for the distance of forty chains and there mark and witness the west quarter corner post, then continuing the line in the same direction forty chains more, he would there set the stake for the northwest corner of section 13. From this point it was his duty to establish a line to the northeast corner of said section as established by the survey of the range line. This was done in the following manner as shown by the field notes introduced in evidence. From the northwest corner east on random line

between sections 12 and 13 forty chains set temporary post; thence east 79 chains and 70 links intersecting range line at 125 links north of post; from post at northeast corner of section 13 ran west on true line 39 chains and 85 links and set and witnessed quarter corner post. The evidence shows a stone now located at the northwest corner of section 13 and a stone at the north line of that section at the quarter corner, and there was evidence tending to show that these stones had been long recognized as marking the correct location of these corners as fixed by the government survey. As to these stones counsel for appellant, upon the trial of the case made the following statement: "Let us say here that we will offer no evidence to dispute either the stone marking the north quarter corner of section 13 or the stone marking the northwest corner of section 13; we don't want to do anything that will relieve you of making out your case as you want to make it, but we will say that we will offer no evidence to contradict either one of these two stones." As heretofore stated the location of the northeast corner of section 13 as fixed by the government survey was lost. For the purpose of fixing its location, several unofficial surveys had been made. Two surveyors testified that they ran the north line of section 13 by starting at the stone at the northwest corner of the section and projecting a straight line over the stone found at the north quarter corner to the range line on the east. The witness Charles testified that a line so projected intersected the range line at a point 12.62 feet north of the "Current Stone" near the east end of appellant's fence, and, at a point opposite appellee's west line, the line so projected was 6.5 feet north of the wire fence; while the witness Clayton testified that a line so projected intersected the range line at a point 6.5 feet north of the east post of appellant's fence.

As bearing upon this evidence the court gave to the jury the following instruction; "No. 6. You are instructed

that evidence has been introduced tending to establish a prolongation of the line from the northwest corner of section 13 to the middle section corner and thence to the range line, which evidence tends to establish that such line would be $6\frac{1}{2}$ feet north of the wire fence recently built by the defendant, North, at the northwest corner of the Jones land and 12.62 feet north of the post at the east end of the fence recently built by the defendant, North. If the jury after considering all of the evidence in the case, find and believe that said line is the north line of said section 13 at that point, and that the intersection of said line so projected and drawn, with the range line, marks the point where the northeast corner section stake was placed by the original government survey, then you may return a verdict for the plaintiff and that he is the owner of said described tract lying between said projected line and said wire fence.” This instruction is subject to criticism for the reason that it gives undue prominence to the testimony of the witness Charles. His testimony as to the location of the projected line in reference to the east end of the fence built by appellant differed from testimony of the witness Clayton. It was the province of the jury, to decide, in the first place, whether either of the projected lines located by these surveyors in the manner described, marked the true north line of section 13; and, if it found that one of said projected lines marked the section line as located by the government survey, it was its further duty to decide by which of said lines it was so marked. This question should have been left to the jury without giving undue prominence to the line as fixed by either witness over that as fixed by the other.

Speaking in reference to the north line of section 13 the court in the latter part of instruction No. 20 to the jury

said; “ * * * such line must be presumed by you

4. to have been a straight line. This presumption must remain until it is shown by the evidence that it was,

in fact, not a straight line. The burden of showing that such a line was not a straight line is upon the party who claims that the line was not straight in fact, and if the evidence as to the line being straight or otherwise, is of equal weight, then and in that case the presumption that the line was straight would not be overthrown." In surveying the north line of two sections lying in the tier immediately west of the range line, the government surveyors began at the northwest corner and ran a random line, parallel with the south township line. At a point midway between the northwest corner of the section line and the range line, they set a stake to mark the temporary north quarter corner; then continued the line in the same direction until it intersected the range line. If the point of intersection coincided with the corner of the section fixed by the previous survey of the range line, the temporary stake, set to mark the quarter corner was established as the permanent quarter corner, and the north line of the section was thus established; but, if the point of intersection with the range line was north or south of the corner of the section as previously located, the surveyors measured the distance from such point of intersection to the section corner and by a computation determined how far the temporary quarter stake would have to be moved to the north or south, as the case might be, in order to bring it in line with the two corners of the section. The quarter corner stake was then moved the required distance and there established as the permanent quarter corner. The computation thus made might be presumed to have been correct and it may therefore be presumed that a line passing over the three corners so established would be a straight line, but this is not necessarily true. There may be a break in the line at the quarter corner. The court takes judicial notice of the rules governing the survey of public lands, and the learned judge who tried the case, correctly informed the jury that the line in question was presumed to be straight. This presumption

arises from the facts of which the court takes judicial notice, but it may, nevertheless, be rebutted by evidence.

Where a party has the burden of proof upon a given

6. issue and a presumption of this kind arises in his favor, either as a result of evidence introduced or from facts judicially known to the court, such presumption will prevail in his favor until it is met and rebutted by evidence. In such a case the party having the affirmative of the issue may rely upon the presumption, and the burden of going forward with the evidence then devolves on his adversary; but the burden of the issue does not shift.

The duty of producing a preponderance of the evi-

7. dence upon a given issue always rests on the party having the affirmative of such issue and the burden of proof can not be changed or shifted by any presumption that may arise during the introduction of the evidence. Under the issues in this case appellee undertook to prove affirmatively that appellant was in the possession of land lying south of the section line dividing his lands from those of appellee. This could be done only by proving the location of the line, and that the appellant was in the possession of lands on the south side thereof. If for the purpose of showing the location of the section line, appellee sought to prove that the north line of Section 13 was straight throughout its entire course, he must establish this fact by a preponderance of the evidence. He might rely, in the first instance upon the presumption that the line was straight, but if evidence was introduced by the defendant tending to show the contrary the question would have to be determined by the jury from the weight of the evidence. In weighing this evidence the jury must find that the preponderance, or greater weight, was with appellee in order to entitle him to a finding in his favor upon this question.

The appellant contended that the north line of this section was not straight but that it broke at the north quarter corner and that the northeast corner of the section, its eastern

terminus, was at a point 12.62 feet south of the point where the range line would be intersected by a straight line projected from the stone at the northwest corner of the section over the stone at the north quarter corner. Evidence was introduced by the appellant tending to prove his contention. The appellee had the affirmative of this issue and must sustain it by the greater weight of the evidence. In weighing the evidence, the presumption referred to would have weight in favor of the appellee, and if the other evidence was equally balanced this presumption would be sufficient to turn the scales in his favor, but, if after weighing this presumption together with the other evidence produced in favor of the appellee on this question as against the evidence produced in favor of the appellant, the jury was unable to say on which side the preponderance lay, the appellee would fail on this issue. 1 Elliott, Evidence §§132, 139, 140; *Cleveland, etc., R. Co. v. Newell* (1885), 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Young v. Miller* (1896), 145 Ind. 652, 44 N. E. 757; *Holt Ice, etc., Co. v. Arthur Jordan Co.* (1900), 25 Ind. App. 314, 57 N. E. 575; *Farmers Loan, etc., Co. v. Siefke* (1895), 144 N. Y. 354, 39

8. N. E. 358. The part of this instruction relating to the burden of proof is obscure and misleading and for that reason should not have been given.

Instruction No. 22 objected to by appellant is as follows: "You are instructed that where a disputed boundary as fixed by the original government survey, is to be determined, the same must be done from the monuments actually fixed and placed by such survey. In determining a boundary by such monuments, if a question arises as to which monument should be used in determining the line, those monuments which are a part of the survey in which the disputed boundary line is fixed, and which are the best known and identified are regarded as the safer guide for determining the boundary of which they are monuments." By the government survey of the north line of section 13 only two monu-

ments were fixed, one at the northeast corner of the section and the other at the north quarter corner. The boundary line, the location of which is in dispute, does not lie between the two corners established by this survey; but it lies between the north quarter corner and the northeast corner of the section as established by the government survey of

the range line, and is properly shown by a straight

9. line connecting these two points. In order to locate this line it was necessary to locate its eastern terminus which was the northeast corner of section 13 as fixed by the government survey of the range line, and to fix this point, evidence relating to the survey of the range line was admissible. Evidence was introduced having a tendency to prove the location of the east quarter corner of sections 13 and 12, both of which were established by the survey of the range line and evidence of the government field notes was introduced showing the distance of these corners from the lost corner. Surveyors testified that they had made measurements in accordance with these field notes and thus fixed the location of the post set by the government to mark the northeast corner of section 13 at a point near the east end of appellant's fence. The weight of this testimony

10. was a question to be determined by the jury. By instruction No. 22, the court in effect told the jury that the monuments fixed in the survey of the north line of the section should be given greater weight in determining the location of the lost line than any monuments established on the range line or any measurements taken therefrom. This instruction invades the province of the jury by indicating that a particular class of evidence is to be given greater weight than other evidence having a tendency to prove the same fact. It is not the province of the court to advise the jury as to the weight or value of evidence. *Indianapolis St. R. Co. v. Taylor* (1905), 164 Ind. 155, 72 N. E. 1045; *Goodwin v. State* (1884), 96 Ind. 550.

By instruction No. 23 the jury was told that fences of

long standing erected upon what parties have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared. This instruction invades the province of the jury and is erroneous for that reason. If the evidence shows that fences were built at a time when the original stakes set by the government to mark the corners were still in existence and that such fences were built with reference to such stakes or their known location, the court might properly instruct the jury that it was proper to consider such facts in determining what weight should be given to the location of such fences as indicating the true line, but the court should not consider the evidence as to such facts and decide therefrom that evidence of the location of ancient fences is of greater weight as indicating the true line than other evidence bearing upon the same subject, and so inform the jury. By so doing the court invades the province of the jury and commits reversible error. Numerous other instructions were given some of which contain the same vice pointed out in those already discussed. This is particularly apparent in instructions Nos. 25 and 30.

Instruction No. 28 is objected to upon the ground

12. that it tells the jury that the defendant had admitted of record that the stone at the northwest corner of
13. the section and the stone at the north quarter corner were correctly located. The statement of the attorney for defendant that no evidence would be introduced to dispute the location of these stones did not amount to an admission that they were correctly located, but, in view of the fact that, at the time such statement was made, some evidence had already been introduced tending to show that such stones were correctly located, the statement complained of was harmless.

The field notes of the government survey of section 18 show that the northwest corner of that section was located

on the range line at a point 54 links north of the 14. northeast corner of section 13. There was also evidence that a road is located on the north line of section 18 and that a stone is located on the range line, on a line with the center of this road. There was also evidence tending to show that this stone marked the northwest corner of section 18 as fixed by the government survey. In respect to this evidence, the court told the jury that if it found that the point at which the north line of section 18 intersected the range line was marked and recorded and undisputed as the original government corner, it might consider its location in determining where the lost corner of section 13 was located. The jury was thus inferentially told that it could not consider this stone in determining the location of the lost corner unless it was marked and undisputed as the original government corner. This is not a correct statement. The jury would have a right to consider this stone for the purpose mentioned if it found from the evidence introduced that it did in fact mark the northwest corner of section 18 as located by the government survey.

If it were shown by the evidence in this case that the plaintiff had occupied a portion of the land north of the section line for twenty years under such circumstances as to give him title thereto by adverse possession, then the north line of his lands would be the north line of the land so adversely occupied regardless of where the section line was originally located. We have carefully examined the record and we find no evidence which could have justified the jury in finding that the plaintiff acquired title by adverse possession up to the line fixed in the verdict. We are equally well satisfied that there is no evidence in the record which would justify a finding that the line in dispute in this case had been established by the mutual agreement of the parties and by occupancy under such agreement. It is apparent that the jury reached its verdict by fixing the lost northeast corner of section 13 at a point on the range line where the same is

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intersected by a straight line commencing at the stone at the northwest corner of the section and thence extended over the north quarter stone to the range line, and by treating this extended straight line as the northern boundary of appellee's land. The jury might have reached the same verdict under proper instructions, but we have no means of knowing that it would have done so. The judgment of the trial court is not so clearly right under the evidence as to warrant us in disregarding the errors pointed out in the instructions. Some other questions are presented which we do not decide for the reason that the same questions are not likely to arise on another trial of the case.

The judgment is reversed with directions to grant a new trial.

NOTE.—Reported in 100 N. E. 84. See, also, under (1) 2 Cyc. 1014; (2) 5 Cyc. 871, 920; (3) 38 Cyc. 1675; (4) 5 Cyc. 876, 955; (5) 16 Cyc. 903; 124 Am. St. 22; (6) 16 Cyc. 934; (7) 16 Cyc. 926, 932; (8) 38 Cyc. 1749; (9) 5 Cyc. 956, 966; (10) 38 Cyc. 1646; (11) 5 Cyc. 971; (12) 38 Cyc. 1809; (13) 16 Cyc. 965, 1042. As to geographical facts of which judicial notice is taken, see 124 Am. St. 32. As to burden of proof generally and on whom it rests, see 135 Am. St. 765. As to conflicts between surveys in determining boundaries, see 22 Am. St. 34. As to invasion by court of jury's province by instructing on matters of fact, see 14 Am. St. 36. As to control of calls for monuments and lines marked on the ground, see 129 Am. St. 996. As to lines run by government surveyors, see 110 Am. St. 677. As to what burden of proof is, and how it applies, see 135 Am. St. 765; 16 Am. St. 439.

ISGRIG v. FRANKLIN NATIONAL BANK.

[No. 7,845. Filed April 2, 1913.]

1. JUDGES.—*Judge Pro Tem.*—*Appointment.*—*Validity.*—*Failure to Sign Order of Appointment.*—The failure of the qualified and acting judge of a court to sign the order appointing a judge *pro tem* does not render such appointment a nullity. p. 219.
2. APPEAL.—*Waiver of Error.*—*Briefs.*—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action is waived by appellant's failure to discuss it in the briefs. p. 219.

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3. **BILLS AND NOTES.—Actions.—Answer.—Non Est Factum.**—In an action on a promissory note executed in the name of a partnership, an answer by one of the partners alleging that the note was not executed by him or by any one in his behalf and that it was not executed for any debt owing by him or the partnership, that it was executed, if at all, by the other partner for matters entirely outside the partnership business, that such other partner had no authority to execute it in the name of the partnership, that such execution had not been ratified by defendant or the partnership, and that no part of the consideration or proceeds was ever received by defendant or by the partnership, would, if verified, have constituted a sufficient answer of *non est factum*. p. 220.
4. **PLEADING.—Answer of Non Est Factum.—Failure to Verify.—Effect.**—A plea of *non est factum*, unverified, is equivalent to a general denial and nothing more. p. 220.
5. **PLEADING.—Answer of Non Est Factum.—Verification.—Waiver.**—The objection that a plea of *non est factum* is not verified cannot be waived, since the code contemplates that the effect of failing to deny the execution of the instrument under oath is to preclude defendant from controverting its execution on the trial. p. 220.
6. **BILLS AND NOTES. — Action. — Issues. — Directing Verdict. —**Where defendant in an action on a promissory note, filed an unverified answer alleging facts which, if verified, would have constituted a good plea of *non est factum*, and on the trial introduced evidence tending to prove the allegations of such answer, the court did not err in disregarding such evidence and directing a verdict for plaintiff who had made a *prima facie* case, since such answer tendered no issue in relation to the execution of the note, and evidence in its support might properly have been excluded, when offered, as not being within the issues. p. 221.
7. **BILLS AND NOTES.—Actions.—Failure to File Verified Denial of Execution.—Effect.**—Failure to file a general denial or special denial under oath amounts to an admission of the execution of the instrument sued on. p. 221.
8. **BILLS AND NOTES.—Consideration.—Satisfaction of Debt of Another.**—The note of a partnership given to a bank in payment of the personal note of one of the partners, was not without consideration, since it is not necessary that the consideration should pass from the payee of a note to the maker. p. 222.
9. **APPEAL.—Review.—Harmless Error.—Misconduct of Counsel.**—Alleged misconduct of counsel was harmless to appellant, where it is apparent that in any event, no different result could have been reached under the issues and the evidence. p. 222.

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From Superior Court of Marion County (80229) ; *Charles J. Orbison*, Judge *Pro Tem*.

Action by the Franklin National Bank against Harry Isgrig and another. From a judgment for plaintiff, the defendant, Harry Isgrig, appeals. *Affirmed*.

Newton J. McGuire and *Herbert A. Luckey*, for appellant.
William P. Herrod, for appellee.

LARRY, J.—Appellee brought this action in the Marion Superior Court against appellants upon a promissory note alleged to have been executed by the firm of Graham and Isgrig. The issues were tried by a jury, which under the instruction of the court returned a verdict in favor of the plaintiff. The defendant, Harry Isgrig, filed a motion for a new trial, which motion was overruled and judgment rendered on the verdict. The errors properly assigned are as follows: (1) The trial court had no jurisdiction to try the cause or to pronounce the judgment appealed from; (3) the complaint does not state facts sufficient to constitute a cause of action; (5) the court erred in overruling appellant's motion for a new trial.

The first question presented by the assignment of 1. errors is based upon the contention of appellant that the appointment of Judge Orbison as judge *pro tem* was a nullity for the reason that the order of appointment was not signed by Judge Bartholomew, the qualified and acting judge of the court in which the case was tried. This question has been recently discussed by this court and decided adversely to the contention of appellant. *Jordan v. Indianapolis Coal Co.* (1913), 52 Ind. App. 542, 100 N.

E. 880. Appellant has waived his third assignment 2. of error by failing to discuss it in his brief. An intelligent discussion of the fifth assignment of error requires a consideration of the issues formed by the pleadings. The complaint was based upon a promissory note which is set out as an exhibit. Appellant filed an answer in

two paragraphs, the first of which was a general denial.

The second paragraph alleged, in substance, that the

3. note in suit was not executed by Isgrig or by anyone in his behalf, and that it was not executed for any debt owing from the defendant Isgrig or from the firm of Graham and Isgrig, or for any debt which said defendant or said firm had assumed or agreed to pay. The answer further avers facts showing that the note in suit was executed, if at all, by Herbert Graham, for matters entirely outside of the partnership business and not within the scope of the partnership affairs, and that Graham had no authority to execute it in the name of the partnership; that neither Isgrig nor the partnership has at any time ratified the act of Graham in executing the note, and that no part of the consideration or proceeds of such note was ever received either by the defendant Isgrig or by the firm of Graham and Isgrig.

This pleading if verified would constitute a sufficient answer of *non est factum*. If so verified its effect would have been to deny the execution of the note either by the defendant Isgrig, or by the partnership of which he was a mem-

ber. This answer, however, was not sworn to, and

4. it has been frequently held that a plea of *non est factum* unverified, is equivalent to a general denial and nothing more. *Hill v. Jones* (1860), 14 Ind. 389; *Newby v. Rogers* (1876), 54 Ind. 193; *Ralston v. Moore* (1886), 105 Ind. 243, 4 N. E. 673; *Cincinnati, etc., Co. v. Chenoweth* (1899), 22 Ind. App. 685, 54 N. E. 403.

5. "There can be no waiver of the objection that such an answer is not verified by failing to move to strike it out, for the code contemplates that the effect of failing to deny the execution of the instrument under oath is to preclude the defendant from giving evidence on the trial for the purpose of drawing the execution of the instrument into controversy." *Penn Mut. Life Ins. Co. v. Norcross* (1904), 163 Ind. 379, 385, 72 N. E. 132. Under the issues

thus formed the plaintiff introduced the note in evidence and introduced testimony tending to show that a reasonable attorney's fee for collecting the note was from \$80 to \$100. The defendant Isgrig then introduced evidence tending to prove the allegations of his answer. Numerous objections were interposed to the evidence so introduced, and the court in ruling upon the objections stated that under the pleadings the execution of the note was not in issue and that the evidence offered could not be considered as tending to prove that the note was not executed or that the firm name was signed without authority. The defendant did not ask to be allowed to amend his answer by swearing to the same, and, at the conclusion of the evidence, the court on motion of the plaintiff directed the jury to return a verdict in favor of the plaintiff for the principal and interest of the note and for such an amount as it found to be a reasonable attorney's fee. The evidence introduced by plaintiff made a *prima facie* case in its favor. Unless there was some evidence introduced by the defendant tending to rebut the *prima facie* case thus made, or tending to establish an affirmative defense, the court committed no error in directing a verdict for the plaintiff. As the answer was not verified, no issue in relation to the execution of the note was presented. Evidence tending to prove that the note was not that of the partnership might have been properly excluded as not being within the issues, and evidence admitted, having a tendency to prove such fact, was properly disregarded by the court in directing a verdict in favor of the plaintiff.

In the case of *Phoenix Ins. Co. v. Rowe* (1889), 117 Ind. 202, 205, 20 N. E. 122; Mitchell, J., said, "A failure to deny the execution of an instrument, which is properly set out as the foundation of the action, by a pleading under oath, has been held to be so far an admission of its execution as to preclude further controversy on that subject." The effect of the decision seems to be, that the

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failure of a defendant to file a general or special denial under oath, amounts to an admission of the execution of the instrument upon which the action is based. *Evans v. Southern Turnpike Co.* (1862), 18 Ind. 101; *Home Ins. Co. v. Gilman* (1887), 112 Ind. 7, 13 N. E. 118.

Appellant contends that the evidence introduced tended to show that there was no consideration for the execution of the note in suit, and that such evidence was admissible under the averments of the answer. We can not agree with this contention. The evidence shows without dispute that the note was given to the bank in payment of a note of like amount held by it which had been previously executed by James W. Graham and that this note was at the time cancelled and surrendered. It is not necessary that the consideration should pass from the payee of a note to the maker. *Holm v. Sandberg* (1884), 52 Minn. 427, 21 N. W. 416; *Thompson v. Gray* (1874), 63 Me. 228; *Seymour v. Prescott* (1879), 69 Me. 376.

Misconduct on the part of counsel for plaintiff was also assigned as a cause for a new trial. In view of the fact that no different result could have been reached under the issues and the evidence, we are unable to see how appellant could have been harmed by the conduct of which he complains. The court did not err in overruling appellant's motion for a new trial.

Judgment affirmed.

NOTE.—Reported on 101 N. E. 398. See, also, under (1) 23 Cyc. 604; (2) 2 Cyc. 1014; 3 Cyc. 388; (3) 8 Cyc. 154, 158; (4) 31 Cyc. 533; (5) 31 Cyc. 732; (6) 38 Cyc. 1565, 1574; (7) 8 Cyc. 186; (8) 7 Cyc. 701; (9) 38 Cyc. 1509.

WAGNER v. MEYER ET AL.

[No. 7,860. Filed April 2, 1913.]

1. **APPEAL.—Review.—Evidence.—Sufficiency.**—Where the evidence is conflicting, and it cannot be said that there was no evidence upon which the court could base its decision, such decision will not be disturbed on appeal on the alleged insufficiency of the evidence. p. 224.
2. **EVIDENCE.—Admissibility.—Surveys.**—Evidence of certain surveys would be inadmissible over proper objections on the ground that neither the records of the surveys, nor any other evidence introduced, showed that any of the adjacent landowners had any notice of any of said surveys, or that they in any way participated in or consented to the making of such surveys. p. 224.
3. **APPEAL.—Presentation of Questions for Review.—Objections to Evidence.**—Appellant can take no advantage of the erroneous admission of evidence by the trial court where the objection presented on appeal was not presented to the trial court and was entirely different from the only objection presented at the trial. p. 224.
4. **TRIAL.—Admission of Improper Evidence Without Objection.—Consideration.**—When evidence, which might have been excluded if proper objection had been made, has been allowed to go before the court, it may be considered for whatever probative value it may have. p. 225.

From Ripley Circuit Court; *Francis M. Thompson*, Judge.

Action by Henry Wagner against Peter Meyer and Henry Reckeweg. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Cornet & Jackson, for appellant.

Thomas E. Willson, Charles H. Willson, Charles R. Willson and Romney L. Willson, for appellees.

IBACH, C. J.—This suit was brought by appellant to enjoin appellees from cutting and removing a fence and from plowing up and digging up and removing the dirt and earth from appellant's real estate. Appellees in answer to the complaint alleged that the fence was in the limits of the highway, and they as trustee of the township and supervisor of roads, respectively, were proceeding to move the fence be-

cause it was in the highway and the appellant had refused, upon due notice, to move it. The errors assigned arise under the motion for new trial. The evidence shows that the highway was ordered laid out by the county commissioners in 1887, thirty feet wide on the east and west center line of section 17, township 8 north, range 11 east. Appellant owned land on the north side of and extending to the center line of section 17. The highway was laid out in 1887, and there was evidence tending to show that it had always been located where it now is. The records of several different surveys were introduced in evidence, by each of which there had been attempts to locate the east and west center line of section 17, as it had been originally laid out. Some of these surveys showed appellant's fence to be nearer than 15 feet to the center of the highway, and therefore

within its limits. There was some conflict as to

1. whether appellant had for more than twenty years held possession of the land within his fence under claim of right. The evidence is conflicting. We can not say that there is no evidence from which the court could find that appellant's fence was within the limits of the highway, and the decision can not be disturbed on the ground that it is not sustained by the evidence.

Appellant, citing *Williams v. Atkinson* (1899), 152

2. Ind. 98, 52 N. E. 603, asserts that the surveys of Cavender, Hughes, Pegee, and Wright were void, and should not be considered in evidence, for the reason that neither the records of the surveys nor any other evidence introduced showed that any of the adjacent landowners had any notice of any of said surveys, or consented in writing to any of said surveys, or were present and participated in or consented to any of said surveys. An objection to the admissibility of this evidence, upon the above grounds would

be proper, and should be sustained under the au-

3. thority cited. But appellant has failed to save any proper objection to the admission of such evidence.

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Appellant himself introduced the evidence of one of these surveys, he failed to object to the introduction in evidence of some of the others, and the only objection made to the introduction of any of them was entirely different from the one here presented. Appellant having failed to object to the introduction of the reports in evidence, upon the ground here asserted, has waived the right to object on such ground, and can take no advantage in this court of the fact that the evidence was erroneously admitted. *Riehl v. Evansville Foundry Assn.* (1885), 104 Ind. 70, 3 N. E. 633; *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541, 549, 70

N. E. 888. When evidence which might have been

4. excluded if proper objection was made, has been allowed to go before the court, it may be considered for whatever probative value it may have. *Riehl v. Evansville Foundry Assn.*, *supra*; *Metropolitan Life Ins. Co. v. Lyons* (1912), 50 Ind. App. 534, 98 N. E. 824. These surveys would have some tendency to show the location of the center line of the section, even though it did not appear that they were made by the consent of the owners. Also, aside from the evidence of these surveys, there was some evidence tending to show that the fence was in the highway.

No error appearing, the judgment is affirmed.

NOTE.—Reported in 101 N. E. 397. See, also, under (1) 3 Cyc. 360; (2) 5 Cyc. 965; (3) 2 Cyc. 693; 38 Cyc. 1388; (4) 38 Cyc. 1394. As to conflicts in surveys in determining boundaries, see 22 Am. St. 34.

CHAMNESS v. CHAMNESS, ADMINISTRATOR.

[No. 7,909. Filed April 2, 1913.]

1. SUBROGATION.—*Voluntary Payments.—Payment of Claim Against Estate.*—An heir, having a personal interest in an estate, who paid claims against the estate, was not a volunteer within the rule that a volunteer is not entitled to subrogation. p. 228.
2. COURTS.—*Circuit Courts.—Exercise of Probate Jurisdiction.—Equitable Questions.*—The circuit courts, in the exercise of

their probate jurisdiction, have the power to determine either legal or equitable questions, when properly presented, and to award all the necessary relief. p. 228.

3. SUBROGATION.—*Right of Subrogation.*—The right of subrogation, being founded on principles of equity and justice, is broad enough to include every instance in which one party, not a mere volunteer, pays the debt of another, primarily liable, and which in good conscience and equity should have been paid by the latter. p. 228.
4. SUBROGATION.—*Rights of Heirs.—Payment of Claim Against Estate.*—An heir who, with the knowledge and consent of other heirs, paid a note owing by the decedent, for the purpose of avoiding the expense of formal administration, was entitled to subrogation to the rights of the creditor. p. 228.
5. SUBROGATION.—*Rights of Heirs.—Expenses of Administration.*—Where, upon a voluntary distribution of a decedent's property, made for the purpose of avoiding formal administration, certain live stock was given to one of the heirs, and the administrator, who was subsequently appointed, permitted such live stock to remain in the custody of such heir until sold, such heir was entitled to recover for his services in feeding and caring for same, and, while such charge is more properly a cost of administration, rather than a claim against the estate, it is one to which the doctrine of subrogation applies. p. 229.
6. SUBROGATION.—*Rights of Heirs.—Payment of Taxes.*—Although by §10340 Burns 1908, Acts 1897 p. 228, an administrator, who fails to pay the taxes against an estate when due, is not entitled to any credit for the penalty occasioned by the delinquency, an heir who pays such taxes, in a case where such payment is necessary to prevent a sale, is entitled to recover the payments from the estate on the principle of subrogation. p. 229.

From Wayne Circuit Court; *Henry C. Fox*, Judge.

Action by Russel Chamness on a claim filed against the estate of Sarah Chamness, deceased, and disallowed by John W. Chamness, administrator. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Beach & Mikels, for appellant.

William O. Barnard and *William E. Jeffrey*, for appellee.

ADAMS, J.—Sarah E. Chamness died intestate on March 3, 1909, leaving as her only heirs, appellant and his sister Ella Howell, children by a former marriage, and John W.

Chamness, her second husband. A few days later, at the instance of John W. Chamness, there was a meeting of the heirs at the late home of the decedent, for the purpose of dividing the personal property and settling the estate out of court. It was understood by all of the parties that to prevent administration on the estate, it would be necessary to pay the debts owing by the decedent. There was a balance due on a note of the decedent to Bue A. Jordan, and said Jordan was threatening to collect the same by law. John W. Chamness was unable to furnish the money to pay this note, and appellant offered to pay and subsequently did pay the same, in the sum of \$36.05. At the meeting of the heirs, a partial settlement was made, and a part of the property allotted to each. To appellant was given certain live stock, which he removed to his home, and kept for five months. On March 20, 1909, John W. Chamness took out letters of administration on the estate of his deceased wife. He did not take possession of the live stock allotted to appellant, but had the same inventoried and appraised, and permitted said stock to remain on the farm of appellant to be fed and cared for by him until the sale, which was held in August following. The value of such feed and care constitutes the second item of appellant's claim. The administrator failed and neglected to pay the November installment of taxes for the year 1908, due and payable in the year 1909, on the personal and real estate of the decedent, and after said taxes became delinquent, appellant paid the same, together with the penalty, and included the amount paid in his claim against the estate. Decedent was a policy holder in a local insurance company, and, after her death, an assessment was made against her policy for its *pro rata* share of losses theretofore occurring. The administrator failed to pay the assessment. On the last day, appellant, to prevent a forfeiture, paid the assessment, which is also included with other items herein noted, in his claim against the estate for reimbursement.

Appellant's claim was disallowed and transferred to the issue docket of the Henry Circuit Court. The venue was changed to the Wayne Circuit Court, where the cause was submitted to a jury. At the close of appellant's evidence, the court sustained appellee's motion for a peremptory instruction, and directed the jury to find for the defendant. A verdict for the defendant was accordingly returned, and judgment rendered thereon. The overruling of appellant's motion for a new trial is the only error assigned and relied on for reversal. The giving of the peremptory instruction was one of the causes for a new trial, specified in the motion.

This is the only question in the case. There is no

1. dispute as to the facts, the appellee merely insisting that appellant, in the payment of the several items embraced in his claim, was a volunteer, and, therefore, not entitled to the right of subrogation. But, Was he a volunteer, in the light of the facts disclosed? We think not. He was not a stranger, but an heir, having a personal interest in the estate.

It is well settled that circuit courts of this State,

2. in the exercise of their probate jurisdiction, have the power to determine either legal or equitable questions, when properly presented, and to award all necessary relief whether legal or equitable. *Galvin v. Britton* (1898), 151 Ind. 1, 11, 49 N. E. 1064, and cases cited. In *Davis v. Schlemmer* (1898), 150 Ind. 472, 478, 50 N. E. 373, the court said: "The right of subrogation is not founded

3. on contract, express or implied, but upon principles of equity and justice, and is broad enough to include every instance in which one party, not a mere volunteer, pays the debt of another, primarily liable, and which in good conscience and equity should have been paid by the latter."

As to the first item of appellant's claim, it would be unconscionable to hold that an heir could not be subro-

4. gated to the rights of creditors, where, with the knowledge and consent of other heirs, he paid a note owing

by the decedent, for the purpose of avoiding the expenses of formal administration. The second item of the claim,

5. being for the value of appellant's services in feeding and caring for live stock belonging to the estate, is not strictly a claim against the estate. Such a charge might be designated more properly as cost of administration, and yet, our decisions have been liberal in applying the doctrine of subrogation even to items of this character. *Pease v. Christman* (1902), 158 Ind. 642, 64 N. E. 90, was a case where a widow contracted for a monument to be erected at the grave of her late husband, and paid for the same out of her own means. She then filed her claim against the estate to be reimbursed for the amount paid. At page 644 the court said: "If the claim in dispute were in the first instance valid and just, and one that could have been legally contracted by the administrator, and paid for by him out of the assets, certainly, then, there can be no reasonable objections urged why appellee may not be subrogated to the rights of the dealer or party who furnished the monument." For the expenses incident to the keeping of live stock belonging to the estate, the administrator clearly had a right to contract. He could have paid the reasonable value of such service out of the assets of the estate, and the fact that appellant himself rendered the service does not in any essential particular change the principle announced.

It also appears that the administrator failed and neglected to pay the taxes assessed against the property of the decedent, and permitted said taxes to become delin-

6. quent. Appellant paid the taxes and penalty, and included the amount in his claim. By §10340 Burns 1908, Acts 1897 p. 226, it is made the duty of an administrator to pay the taxes out of the assets in his hands belonging to the estate, and on failure to pay, he is not entitled to any credit for the penalty occasioned by delinquency. But in this case, it was necessary to pay the taxes to prevent a sale. Appellant was not a stranger or volunteer. He was

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an heir interested in the estate, and his act was clearly beneficial thereto. In the case of *Brown v. Forst* (1884), 95 Ind. 248, the widow paid certain claims against the estate, and for the aggregate amount of the claims paid by her, filed her own claim asking to be reimbursed. The court, at page 250, said: "We think that a widow has such an interest in the settlement of her deceased husband's estate as will, where it is beneficial thereto, enable her to be subrogated to the rights of creditors whose claims have been paid by her, or by her money advanced to the executor or administrator for that purpose." The foregoing rule was expressly approved and followed in *Neptune v. Tyler* (1896), 15 Ind. App. 132, 41 N. E. 965, and we think is conclusive of the question presented by the record before us. The claims paid by appellant were shown, without contradiction, to be valid demands against the estate. The court erred in directing the jury to return a verdict for appellee.

The judgment is reversed, with instructions to the trial court to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 101 N. E. 323. See, also, under (1) 37 Cyc. 375, 393; (2) 11 Cyc. 791; (3) 37 Cyc. 370; (4) 37 Cyc. 393; (5) 37 Cyc. 392; (6) 37 Cyc. 443. As to subrogation generally and by whom it may be invoked, see 99 Am. St. 496. As to the right of one who advances money for the payment of a debt or incumbrance against a decedent's estate to be subrogated to the creditor's rights, see 11 Ann. Cas. 676.

THE CITIZENS TELEPHONE COMPANY v. THE FORT WAYNE AND SPRINGFIELD RAILWAY COMPANY.

[No. 7,734. Filed December 18, 1912. Rehearing denied April 2, 1913.]

1. PLEADING.—*Complaint.—Theory.—Sufficiency of Paragraphs.*—A complaint must proceed upon a definite theory and the averments must be sufficient to support that theory, and, if there is more than one paragraph of complaint, each must be tested by

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its own averments and cannot be aided by the averments appearing in another. p. 233.

2. **ELECTRICITY.—*Conflicting Uses.—Damages.—Complaint.—Sufficiency.***—A complaint by a telephone company against an electric railway company for injury to plaintiff's line by the conduction or induction of electric current from defendant's trolley wires, merely charging that defendant negligently and carelessly built and operated its railroad close to and parallel with plaintiff's telephone line, and that defendant could have constructed said railroad and trolley wire upon a route more distant so as not to interfere with the operation of such telephone line, was insufficient both on the theory of negligence and on that of an action at common law for maintaining a nuisance. pp. 233, 235.
3. **ELECTRICITY.—*Occupation of Highways.—Telephones.—Railroads.***—The rights of a telephone company and a railroad company in the occupancy of a highway are coördinate and equal and, while each, in the use of its respective rights, is wholly independent of the other, neither owes any duty to the other beyond that of not carelessly, negligently, or maliciously interfering with the rights of the other. p. 234.
4. **ELECTRICITY.—*Conflicting Uses.—Complaint.—Presumptions.***—In an action by a telephone company against an electric railway company for injury to plaintiff's lines resulting from the conduction or induction of electric current from defendant's trolley wires, it will be presumed, in the absence of any averments in the complaint to the contrary, that in the construction of its road defendant was simply carrying out the authority given it by the general laws of the State, that the road was built in a proper manner, and that it was being operated by the most improved method known to modern science, and with the highest degree of care. p. 235.
5. **ELECTRICITY.—*Conflicting Uses.—Liability.***—As a general rule, there is no liability resulting from conflicting uses of electricity, unless there has been negligence on the part of one of the conflicting users, but the rule is subject to the modification that a mere legislative grant must be exercised in strict conformity to private rights, and will not excuse one from liability where, without a just regard to the rights of others, he destroys and injures such rights to the extent of confiscation of property. p. 237.
6. **APPEAL.—*Review.—Ruling on Demurrer.***—The ruling of the court in sustaining a demurrer to all the paragraphs of a complaint, when the demurrer filed only questioned the sufficiency of two of the paragraphs, constituted reversible error, although the two paragraphs to which such demurrer was addressed were insufficient. p. 238.

From Adams Circuit Court; *Charles E. Sturgis*, Judge.

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Action by The Citizens Telephone Company against The Fort Wayne and Springfield Railway Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Amos P. Beatty and David E. Smith, for appellant.

John H. Koenig and Clark J. Lutz, for appellee.

IBACH, C. J.—Appellant brought this action against appellee in the Adams Circuit Court to recover damages. The amended complaint in three paragraphs is lengthy, and we will not set it out in full. The first paragraph avers in substance, however, that appellant and appellee are corporations duly organized under the laws of the State of Indiana. That appellant had first constructed its telephone system in various towns and cities and through the highways connecting the city of Ft. Wayne with the city of Decatur, Indiana, and that afterwards appellee constructed its electric railway in close proximity to and parallel with appellant's telephone line and by reason of the strong electric current necessarily used by appellee to operate its cars, appellant's telephone wires and exchanges were greatly interfered with and its business interrupted; that this interference was caused by what is known as "conduction," that is, the currents of electricity employed by appellee were of such an intense character that they escaped through the ground and intercepted at some point or another the return currents of electricity used by the telephone company which were of less voltage, and to escape this influence it was required to run its wires a great distance away from appellee's wires. The second paragraph is quite similar to the first except that it is stated in this, that the interference to appellant's wires was caused by what is known as "induction", that is, the high voltage currents of electricity used by appellee placed in motion a sympathetic vibration in appellant's wires which were in close proximity to that of appellee, and by reason of the induction thus produced, appellant's wires were so influenced that they had to be moved a long distance away

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from the place where first erected. The third paragraph contains averments similar to those of both the first and second, and further charges that because appellee had failed to make use of any devices of any kind to prevent such "conduction" and "induction," appellant's lines were made useless and they had to be moved to escape the effect occasioned by the presence of appellee's wires. It is further averred in each paragraph of complaint that appellant had obtained from the cities of Decatur and Ft. Wayne its franchise to erect and construct its poles and wires in the streets of such cities, also that appellee equipped its railroad with what is known as a single phase, alternating current, overhead trolley wire, or trolley system, and that the damages were occasioned without any fault on appellant's part. These averments are followed by the demand for \$8,000 damages.

The record discloses that a demurrer was filed to the first and second paragraphs of the amended complaint and that the court sustained a demurrer to "each paragraph of the amended complaint." The separate errors assigned for reversal are (1) sustaining appellee's demurrer to the first paragraph of complaint, (2) sustaining appellee's demurrer to the second paragraph of complaint, (3) sustaining appellee's demurrer to the third paragraph of complaint, (4) rendering judgment against appellant on the demurrer.

A complaint must proceed upon some definite

1. theory and the averments must be sufficient to support such theory and where there is more than one paragraph of complaint each paragraph must be tested by its own averments. One paragraph can not be aided by the averments appearing in another. *Daly v. Gubbins* (1905), 35 Ind. App. 86, 73 N. E. 833; *State v. Adams Express Co.*

(1909), 172 Ind. 10, 87 N. E. 712. The theory of

2. the first paragraph of the amended complaint is for damages caused by "conduction" and the only averment charging negligence is that "the said defendant did

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negligently and carelessly build, construct and operate said railroad close to and parallel with plaintiff's said toll line." No negligence is charged either in the manner of building or the method of operating the road. In the second paragraph the additional negligence charged is "that defendant could have built and constructed its said railroad and trolley wire between said cities upon a different and more distant route from plaintiff's said toll line so that the operation of the same could not and would not interfere with the operation of plaintiff's said toll line and telephone system, etc." It will be observed that we here have a case where both appellant and appellee are making use of the streets of Decatur and Ft. Wayne and the highways connecting these cities by virtue of the rights granted them by their franchises and under the same statute law. §5796 Burns 1908, Acts 1903 p. 204; §5675 Burns 1908, Acts 1903 p. 92. The law also grants to an interurban railroad the right to use electricity as a motive power, §5675 Burns 1908, Acts 1903 p. 92. Section 5679 Burns 1908, Acts 1903 p. 92, bestows upon interurban railroad companies the right of eminent domain. It seems from the above sections that the evident purpose of the legislature was to enable both the contending companies here to do and accomplish that public service for which they were incorporated upon such streets and highways as they might each select, and upon which the opportunity to operate was given them by the proper authorities, but without giving to either any dominant or greater right than

3. was granted to the other. Therefore we hold that

the rights granted appellant and appellee to occupy the highways in question are coordinate, and in their respective use of the same, the one for telephone purposes, the other for electric railway purposes, they are wholly independent of each other, yet possessing equal rights, and no other or higher duty is imposed upon each than that in carrying out the various purposes of their organizations, the one does not carelessly, negligently or maliciously interfere with the

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rights of the other. In the case of *Pennsylvania R. Co. v. Marchant* (1888), 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659, the court said on page 559: "No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own." In the case of *Cleveland, etc., R. Co. v. Wisheart* (1903), 161 Ind. 208, 215, 67 N. E. 993, a similar principle is involved. In that case the Supreme Court makes the following announcement: "There is an entire absence in the paragraph in question of any direct averments or statements of fact to show that the injury or grievance of which appellee complains was due either to the negligence or wilfulness of appellant, and for this reason, if no other, the pleading is insufficient." Therefore it cannot be said that the mere fact that appellee conducted its line of railroad with its high voltage system of electricity necessary to propel its cars, in close proximity to appellant's wires, on a public highway, when it might have been constructed elsewhere would of itself constitute an act of negligence on which appellant could base a cause of action. Neither would it state a cause of action at common law for maintaining a nuisance, for in such a case the complaint should state facts sufficient to show that the acts complained of constitute in law a nuisance. Such facts do not appear here. See *Nordhurst v. Fort Wayne, etc., Traction Co.* (1904), 163 Ind. 268, 71 N. E. 642, 66 L. R. A. 105, 106 Am. St. 222, 2 Ann. Cas. 967.

There is no averment that appellee exceeded in any
4. manner the rights given it by direct statute, and since there are no averments to the contrary, the courts will presume that appellee in the building and operation of its railroad, was simply carrying out the authority given it by the general laws of this State. To hold otherwise

would in effect grant to appellant a full and complete monopoly over the streets and highways now in question. This we are in no sense permitted to do. These two paragraphs of complaint are entirely barren of any averments from which it could be said that there was any negligence either in the construction of appellee's railroad, or in the operation of the same; neither is it made to appear that the construction work was in any manner faulty, or that the various appliances used in operating the cars were in any respect faulty or improper; nor that it is possible or practicable for appellee by any known suitable equipment to avoid interference complained of, either from conduction or induction. In the absence of these averments we again have the right to assume that the road was built in a proper manner, and that it was at the time complained of, being operated by the most improved method known to modern science and with the highest degree of care. *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.* (1911), 48 Ind. App. 584, 92 N. E. 989, 95 N. E. 596.

Appellee has based its argument for the sufficiency of its complaint upon the case of *Cumberland Tel., etc., Co. v. United Electric R. Co.* (1893), 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236. In Deiser, *Law of Conflicting Uses of Electricity and Electrolysis* 81, it is said of this case, "The principles involved may be summarized as follows: 1. The operation of a street railway in the street, with any incidental inconvenience or damage to objects in the street, is a legitimate use of the streets within the purpose of their original dedication, but. (a) This principle does not extend to property rights outside the street. 2. Telephone and other companies may not obstruct the operation of street railways. 3. Both telephone and railway companies must exercise their powers with a careful and prudent regard for the other's rights. 4. If the 'ordinary use' of a railway franchise be such as to injure the telephone franchise unnecessarily, the cost of any change necessitated must fall upon the street railway. 5. The railway company is not liable

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for injuries to the lines of the telephone company on the same streets, due to induction, or conduction. 6. The railway company is liable for damages inflicted upon the telephone exchange located upon private property outside of the streets, by conduction. 7. If the telephone company can protect its lines by the adoption of the McCluer device, (a large copper wire attached at both ends to the out-going, [from its exchange] telephone wires), the cheapest effective remedy for injury by conduction, and capable of being applied alone by the telephone company, it is the right and duty of the telephone company to resort to the device, and it may recover the cost of installing it from the railway company.''' From the above summary it is apparent that the paragraphs of complaint under consideration do not state a cause of action under the doctrine of the case relied upon. It does not appear from their averments that the telephone franchise was injured *unnecessarily*, nor by direct averments that there was any damage inflicted upon property of the telephone company located *outside the streets*, by conduction. Under the doctrine of this case, a telephone company may not only recover damages caused to its property by the railroad company's negligent use of its franchise, but the case further lays down the rule, that the railroad company, in the absence of negligence, is liable for damage to property located outside the streets, as for a taking of property without compensation. However, the courts of this State

5. have firmly laid down the rule that there is no liability in cases of this kind, except there has been negligence on the part of one of the conflicting users of electricity. *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., supra*. It must be remembered, however, that a careful examination of the recent cases involving questions akin to the ones here presented, shows the tendency of modern opinion to be against permitting unnecessary injury to be inflicted without regard for the rights of the injured party. These decisions, without exception, seem to be in favor of reconciling and

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adjusting all conflicting rights, so that all parties interested may with the least interference possible, exercise the franchise granted to each. Deiser, *Law of Conflicting Uses of Electricity and Electrolysis* 76. And while the general rule seems to be as above stated, and as announced in *Panton v. Holland* (1819), 17 Johns. (N. Y.) *92, *99, 8 Am. Dec. 369, that "no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others, when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously" this principle is subject to many modifications, and a mere legislative grant must be exercised in strict conformity to private rights and will not excuse one from liability where without a just regard for the rights of others he destroys and injures such rights to the extent of confiscation of property. So we are convinced that such facts might be made to appear by proper averments, that a street railroad company, in the use of its high voltage currents of electricity in the operation of its cars, had so failed to confine and control such electric currents as to injuriously affect and perhaps destroy the property of a telephone company, and make the railroad company liable for the damages unnecessarily occasioned to the property of the telephone company, but no such facts appear in the pleading now under consideration, and the demurrers to the first and second paragraphs of complaint were properly sustained.

We have said that the complaint is in three paragraphs, but the demurrer filed questions only the sufficiency of the first two. The sufficiency of the third paragraph has never been tested by demurrer in the court below, and as each paragraph of complaint must stand or fall on its own averments, the trial court committed error by sustaining a demurrer to the third paragraph of complaint and rendering judgment thereon, and for this reason the judgment must be reversed.

Judgment reversed.

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NOTE.—Reported in 100 N. E. 300. See, also, under (1) 31 Cyc. 116; (2) 15 Cyc. 477; 29 Cyc. 1262; (3) 15 Cyc. 460; (4) 15 Cyc. 477; (5) 15 Cyc. 470; (6) 31 Cyc. 348.

INDIANA UNION TRACTION COMPANY v. SULLIVAN.

[No. 7,834. Filed April 4, 1913.]

1. **MASTER AND SERVANT.—*Injury to Servant.—Complaint.—Evidence.***—In an action against an electric railway company for injuries caused by an electric shock to an employe in charge of machinery installed in a car which defendant was using as a temporary substation, where the complaint averred generally defendant's failure to use reasonable care to provide plaintiff a reasonably safe place to work, and also averred negligence in placing two insulated wires along the ceiling of the car and connecting with a switchboard at one end thereof and with high-tension wires at the other, it was not error to permit a witness for plaintiff to testify that the wires ought to have been brought into the car at the end thereof nearest to the transformers, since such evidence tended to prove a lack of reasonable care and was therefore within the issues. p. 243.
2. **APPEAL.—*Questions Reviewable.—Instructions.***—Unless instructions are brought into the record by one of the modes prescribed by statute, they will not be considered on appeal. p. 244.
3. **APPEAL.—*Record.—Questions Presented for Review.—Instructions.***—Where the instructions of the appellee and appellant and those given by the court appeared in the order named, following a record entry that "the argument of counsel having been heard, the court having given the instructions, which instructions given and those refused are by order of the court filed in open court and are in the words and figures following," and the instructions of the appellee, as well as those of appellant, were headed by a request properly signed, and at the close contained the memorandum of the court showing those that were given and those refused, followed by the exceptions properly taken and signed, and the court's instructions were properly signed and the exceptions thereto properly taken, the instructions were in the record in substantial compliance with §561 Burns 1908, Acts 1907 p. 652. p. 244.
4. **MASTER AND SERVANT.—*Injury to Servant.—Instructions.—Assumption of Risk.***—In an action against an electric railway company by one who was employed to care for machinery in a car used by defendant as a temporary substation to recover for injuries from an electric shock caused by alleged defective wiring,

an instruction which, when read in its entirety, limited the right to recover in such cases to those injuries resulting from the employer's failure or neglect to disclose hidden or latent and unseen defects or perils, the risk of which is not assumed by the employe, and which by implication informed the jury that it was not the master's duty to protect the servant against dangers reasonably and fairly incident to and within the ordinary risk of the services which he has undertaken, was not erroneous, although not entirely free from criticism. p. 245.

5. MASTER AND SERVANT.—*Injury to Servant.—Instructions.—Safe Place to Work.*—While the statement in an instruction that "the defendant is required to furnish its employes with a suitable and ordinarily safe place in which to perform their duties" is not technically correct and is open to criticism, the defect was harmless, since, when considered in the light of the other instructions, the jury must have understood therefrom that the place of work must be ordinarily safe when considered with reference to the character of the work required. p. 247.

6. MASTER AND SERVANT.—*Safe Place to Work.—Care Required.*—In furnishing the employe a place to work, the master must use that degree of care and caution which ordinary prudence would dictate, taking into account the dangers and hazards of the service required and the usual and known methods of avoiding the same. p. 247.

7. MASTER AND SERVANT.—*Injury to Servant.—Instructions.—Assuming Facts.*—In an action by the custodian of a car, used by defendant as a temporary substation for its electric railway, for injuries received from an electric shock alleged to have been caused by defective wiring, an instruction which in effect told the jury that if it finds that there was a safe way in which defendant, without any great additional expense or interference with its business, could have connected its high tension wires with its transformers, it was its duty to choose such safe way rather than the unsafe one, was erroneous in that it assumed that the way in which the wiring had been done was dangerous and that the same had been negligently done. pp. 248, 250.

8. NEGLIGENCE.—*Jury Question.*—The question of negligence is ordinarily one of fact for the jury, but the court may, where the facts admit of no other inference, tell the jury that if it finds that such facts were proved, negligence may be inferred therefrom. p. 250.

From Tipton Circuit Court; *Leroy B. Nash*, Judge.

Action by Ruel G. Sullivan against the Indiana Union Traction Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Indiana Union Traction Co. v. Sullivan—53 Ind. App. 239.

James A. Van Osdol, Louis B. Ewbank, Kittinger & Diven and J. R. Coleman, for appellant.

Ellis & Ellison, for appellee.

HOTTEL, J.—This is an action for personal injuries sustained by appellee while in the employ of appellant and alleged to have been caused by the escape of electricity from appellant's high voltage wires. The complaint is in one paragraph and states in detail facts showing that appellant is a corporation engaged in the business of operating a system of street and interurban railroads; that for such purpose it produces, carries and stores electric currents; that a uniform supply along its various lines is maintained by stations and substations, located at points distant from its central power station; that on and prior to November 12, 1907, defendant conducted one of said substations at the town of Lafontaine, in Wabash County, Indiana; that plaintiff was employed as tender for said station, his duties being to clean and look after certain machines and switchboards therein; that a few days prior to said date the defendant for the purpose of making some changes and repairs at said station, placed a car upon a side track in close proximity thereto and equipped such car with a switchboard and necessary appliances to use temporarily as a substation; that an electrical current of 500 to 700 volts could be and was then being carried and conveyed by means of insulated wires in such a way that a person being in close proximity to such wires would not be shocked or injured; that a wire charged with voltage of anything above 1,000 volts insulated in the regular way was extremely dangerous to those near or about the same. "That the defendant was negligent and careless in placing said car at said point for said purpose in this, that the same was too small and of not sufficient height of ceiling to enable a person having charge thereof to perform his duties with reasonable safety under the circumstances; that it negligently and carelessly placed and equipped two insulated wires along

the ceiling of said car and connected the same at one end with its switchboard and equipment in said car, and at the other end with high tension wires carrying a voltage of 3,000 to 3,500 volts, and so attached as to charge said wires in said car with said high voltage; that said wires were so placed as to be in close proximity to the head of the person who would perform the duties of tender in said car; that after its wires were so placed and connected the defendant negligently and carelessly ordered the plaintiff to enter and take charge of such car and to clean the machinery therein, and required him to be in such parts thereof as would bring his head in close proximity to said heavily charged wires, and needlessly and unnecessarily exposed him to great danger of life and limb by being burned and shocked by the electricity in said wires; that the defendant negligently and carelessly failed and neglected to use reasonable care to provide the plaintiff with a reasonably safe place to perform his duty as aforesaid, and negligently and carelessly equipped said car as aforesaid, and negligently and carelessly used said car for said purpose, the same being too small and too low for said purpose, and negligently and carelessly ordered, directed and required the plaintiff to clean said machinery and perform his duties in said car and in close proximity to said wires as aforesaid, and negligently and carelessly failed and neglected to notify or apprise plaintiff or give him any notice or warning whatever of the dangerous character of said wires and surroundings; that the plaintiff, in obedience to said order, and demand of defendant and in the line of his duty under said employment, did on November 9, 1907, enter said car and proceed with his duties as tender thereof, and while cleaning the machinery and appliances therein, where he was so ordered, directed and required to be, was then and there, by reason and on account of the said negligence and carelessness of the defendant, greatly burned, shocked and injured by said electric current." The complaint contains the necessary averments

with reference to appellant's knowledge and appellee's lack of knowledge of the manner of the equipment of the car and the dangers to which appellee was exposed by being required to work therein.

A demurrer to this complaint was overruled and the issues closed by a general denial. A trial by jury resulted in a verdict for appellee in the sum of \$3,500, with which was filed answers to a number of interrogatories. A motion for a judgment on such answers and a motion for a new trial were each overruled and exceptions saved. The ruling on each of these motions is assigned as error and relied on for reversal.

The sufficiency of the complaint is not here questioned and it is conceded by appellant that "under the extreme rule" applied in this court there is evidence tending to support its

allegations, but it is insisted that a part of this evidence was outside the issues, and that error was committed in its admission. One of appellee's witnesses was asked the following question "I will ask you if this car of which I have described with the rotary in one end the transformers in the other is run up along the side of a regular relay station from which it receives the current of over 16,000 to 26,000 volts; what would be the modern and approved manner of equipping the car as to the end of the car, for safety that wires should be brought in? * * * Tell which end of the car the wires should be brought in?" and the witness was permitted to answer: "The wires should come in the end of the car closest to the transformers." Objections were made by appellant to this question which were overruled and exceptions properly saved. A motion was also made to strike out the evidence which was also overruled and exceptions saved. The complaint expressly avers that the "defendant negligently and carelessly placed and equipped two insulated wires along the ceiling of said car and connected the same at one end with its switchboard and equipment in said car, and at the other end with high

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tension wires.” We think this averment entitled the appellee to any evidence that might tend to prove that appellant was careless and negligent in the placing of said high tension wires. It will also be observed from the averments of the complaint above set out that it contains the general averment that the appellant “negligently and carelessly failed and neglected to use reasonable care to provide the plaintiff with a reasonably safe place to perform his duty.” Under this general averment, any evidence which would prove or tend to prove such lack of reasonable care was admissible. The evidence complained of tended to prove such lack of reasonable care, and was therefore within the issues.

Alleged error in giving and refusing certain instructions is next urged. We are here met with an earnest insistency by appellee that the instructions are not in the record and that any error predicated in the giving or refusal to give any of them is therefore unavailable on appeal. It

2. is too well settled to need the citation of authority that, unless the instructions are brought into the record by one of the modes prescribed by statute, they will not be considered on appeal. Appellee contends:

3. (1) that the record fails to show a filing of the instructions; (2) that it is not shown that all the instructions given and refused are in the record. The following is a part of the record entry on the subject: “The argument of counsel having been heard, the court having given the instructions, which instructions given and those refused are by order of the court filed in open court and are in the words and figures following:—” Immediately following this entry are the instructions of appellee and appellant and those given by the court in the order named. At the beginning of appellee’s instructions is his request that they be given, properly signed by (his) attorneys. There is also, at the beginning of appellant’s instructions, a request that they be given, signed by its attorneys. At the close of appellee’s instructions is a memorandum as follows: “Of

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the above and foregoing instructions tendered and requested by the plaintiff, those numbered 1, 2, 3, 4, 5, 6 and 7 are refused and those numbered 8, 9, 10, 11, 12 and 13 are given by the court this March 18, 1910. Leroy B. Nash, Judge Tipton Circuit Court. And to the giving by the court of the above and foregoing instructions requested and tendered by plaintiff, those numbered 8, 9, 10, 11, 12 and 13 and each of them severally, the defendant objects and excepts, this 19th day of March, 1910. J. A. Van Osdol, W. A. Kittinger, J. R. Coleman, Attys. for Defendant.” A like memorandum appears at the close of appellant’s instructions except the modification necessary to make it apply to its instructions and except also that the exceptions taken are signed by appellant’s attorneys. The court’s instructions are properly signed by the judge, and appellant’s exceptions thereto, noted and signed by appellant. We think we have indicated enough of the record to show that the instructions are brought into the record in this case by a substantial compliance with both the letter and spirit of §561 Burns 1908, Acts 1907 p. 652, and the decisions of the Supreme Court and this court construing such section.

Complaint is made of instruction No. 12 given at

4. appellee’s request. This instruction is as follows:

“The defendant is not an insurer of its employees against injury, nor does it covenant to supply a place for them to work in that is safe beyond a peradventure or contingency, *but, notwithstanding this, the defendant is required to furnish its employes with a suitable and ordinarily safe place in which to perform their duties* in order to perform the duties required of them and an ordinarily suitable place in which to prosecute their work, and an employee has a right to repose confidence in his employer that he has exercised proper prudence and caution in providing him such an ordinarily safe place in which to perform his duties and rely upon the safety of the place assigned to him and *where an employee, thus relying, receives injuries in consequence*

of the failure or neglect of the employer to disclose to him hidden or latent and unseen defects or perils which the employer knew or which he should have known by the exercise of reasonable prudence and where an employee is without fault or negligence on his part, the employer must respond in damages for any injury thus sustained. The employer especially acknowledges that he will not expose the employee to danger which is not obvious or of which the latter has no knowledge or adequate comprehension, and which is not reasonably fairly incident to and within the ordinary risk of the services which he has undertaken. And if you find, from a preponderance of the evidence in the case, that the defendant, the Indiana Union Traction Company, failed to perform its duties thus defined toward the plaintiff, and as a result of such failure of duty on its part the plaintiff, while engaged in his duties toward the defendant, was injured, as averred in his complaint, as a result of a hazard which was not open and apparent to him and which was unknown by him at the time and without fault or negligence on his part, then the defendant would be liable to the plaintiff for such injury, and your verdict should be for the plaintiff." It is insisted that this instruction attempts to state under what circumstances the master is liable for actionable negligence and upon the hypothesis therein stated directs a verdict for appellee, and that it omits the element that "the servant assumes those incidental dangers of which he knew or by the exercise of ordinary care could have known." We think the words of the instruction which we have italicized, answer this objection. These words, by implication, inform the jury that it is not the master's duty to protect his servant against dangers "reasonably and fairly incident to and within the ordinary risk of the services which he has undertaken," and, the instruction, when read in its entirety, limits the right to recover in such cases to those injuries resulting from the failure or neglect of the employer to disclose *hidden*, or

latent and *unseen* defects or perils, the risk of which is not assumed by the servant, under his contract of employment. The instruction, in some of its parts, is not entirely free from the criticism which appellant makes, but when read in its entirety, we think states the law in accord with the authorities. *Wabash, etc., R. Co. v. Morgan* (1892), 132 Ind. 430, 31 N. E. 661, 32 N. E. 85; *Indianapolis Traction, etc., Co. v. Holtsclaw* (1908), 41 Ind. App. 520, 527, 82 N. E. 986; *Columbian Enameling, etc., Co. v. Burke* (1906), 37 Ind. App. 518, 522, 77 N. E. 409, 117 Am. St. 337.

Objection is also made to that part of the instruction which tells the jury that “the defendant is required to furnish its employes with a suitable and ordinarily safe place in which to perform their duties.” This statement is not technically correct and is open to criticism. What might be an ordinarily safe place to work in one line of business would not be ordinarily safe in another line of business. The rule as generally stated is that “the master must exercise reasonable care and diligence to provide his servants with a safe place in which to work.” *Indianapolis Traction, etc., Co. v. Holtsclaw, supra*, 527; *Cleveland, etc., R. Co. v. Snow* (1906), 37 Ind. App. 646, 652, 653, 77 N. E. 908; *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151, 162, 5 N. E. 187; *Bedford Quarries Co. v. Bough* (1907), 168 Ind. 671, 689, 80 N. E. 529, 14 L. R. A. (N. S.) 418.

The effect of this rule is to require the place of work to be ordinarily safe for the employes when considered with reference to the character of the work required of them, and we think this was the meaning intended by the instruction and that it was so understood by the jury. The safe rule, however, is to qualify or indicate the care to be used in providing the safe place of work rather than to qualify the place of work as was done in this instruction. The master in such cases must exercise that degree of care and caution which ordinary prudence would dictate, taking into account

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the dangers and hazards of the service required and the usual and known methods of avoiding the same. *Jenny Electric Mfg. Co. v. Flannery* (1913), *post* 397, 98 N. E. 424, 428. This degree of care and caution would doubtless result in an "ordinarily safe place of work" when reference is had to the character of the service required. The instruction omits the qualifying words above indicated and therein affords a reason for just criticism. However, we are inclined to believe that when the instruction is considered with all the other instructions given in the case, that the jurors were not misled thereby and that they understood it as having the meaning above indicated.

Complaint is also made of instruction No. 13 given

7. at appellee's request, which is as follows: "While the defendant is not an insurer against accident for injury to its employees, yet I instruct you that if you find, from a preponderance of all the evidence, that the plaintiff was employed to work for the defendant in its substation at Lafontaine, Indiana, then I instruct you that it was the duty of the defendant to exercise reasonable care and prudence in providing the plaintiff with a safe place in which to perform his duties under said employment, and this duty of the defendant is a continuous one, through all of plaintiff's said employment; and if you find, from a preponderance of all the evidence, that the defendant while attempting to repair its regular substation at said town of Lafontaine, ran one of its cars upon the side track or switch at said town, and attempted to equip the same with machinery and appliances and switch boards necessary for the purpose of using the same as a temporary substation at said point, then I instruct you that it was the duty of the defendant in doing so to exercise reasonable care and precaution in the manner and method in which the appliances and equipments of said car were arranged for the safety of those who were required to work in said temporary substation; and if you find, from a preponderance of all the evidence, that the defendant, in

equipping said car for said purpose *could have placed its high tension wires through the other end of the car from which it did place them and thereby brought down its wires at said end of said car to the transformers in said car and thereby avoided having said wires placed the length of said car overhead and under the ceiling thereof, and if you further find that the same could have so been done without any great additional expense or interference with defendant's business in said substation, and that thereby the rotary in the opposite end of said car (if you find said rotary was in opposite end of said car) could have been safely cleaned and put in condition without exposing the plaintiff to hazard or danger from said wires while cleaning said rotary, then I instruct you that it was the duty of the defendant to take said precaution and so place said wires at said end of said car so that the danger to the plaintiff, if any, while working in said car, about said rotary, could have been avoided, and if you find, from a preponderance of the evidence, that the defendant did not exercise reasonable care and precaution in so placing said wires, and as a result of said neglect on the part of the defendant, the plaintiff was injured, as averred in his complaint, by reason of the current escaping from said wires and coming in contact with this plaintiff, which danger and hazard was unknown to the plaintiff and could not have been discovered by him, by the exercise of ordinary care and prudence, and that he was injured without any negligence or fault on his part, then the defendant would be liable to the plaintiff for any injury so received, and your verdict should be for the plaintiff."* It is insisted that this instruction told the jury, in effect, that it was the duty of the defendant "to have placed its high tension wires through the other end (of the car) from which it did place them," and that in this respect the instruction was outside the issues. What we have already said with reference to the averments of the complaint on this subject and the admission of the evidence thereunder, disposes of this ob-

jection. It is next urged that this instruction invaded the province of the jury in attempting to tell it as a matter of law that it was appellant's duty to wire its car in the particular manner indicated by the instruction. Ordi-

8. narily, negligence is a question of fact for the jury to determine from the evidence and not for the court to declare as a matter of law. *Pennsylvania Co. v. Hensil* (1880), 70 Ind. 569, 575, 36 Am. Rep. 188; *Cincinnati, etc., R. Co. v. Grames* (1893), 136 Ind. 39, 49, 34 N. E. 714; *Louisville, etc., Traction Co. v. Korbe* (1911), 175 Ind. 450, 93 N. E. 5, 94 N. E. 768; *City of Franklin v. Harter* (1891), 127 Ind. 446, 450, 26 N. E. 882; *Chicago, etc., R. Co. v. Martin* (1903), 31 Ind. App. 308, 315, 65 N. E. 591; *Saylor v. Union Traction Co.* (1907), 40 Ind. App. 381, 386, 81 N. E. 94.

The court may, however, assume certain facts within the issues and in support of which there was some evidence and where the facts so assumed to exist admit of but one inference, and that inference is one of negligence, the court may tell the jury that if it finds such facts to be proven

by the evidence, it may infer negligence. The in-

7. struction complained of tells the jury, in effect, that if it finds that there was a safe way in which the appellant, without any great additional expense or interference with its business, could have connected its high tension wires with its transformers, that it was its duty to choose such safe way rather than the unsafe one. The instruction is subject to the charge that it in effect assumes that the way in which the wire was brought into the car and run along the top thereof was dangerous, and that appellant had not used reasonable diligence and care in placing it so as to make it safe. This court, in the case of *Jenny Electric Mfg. Co. v. Flannery, supra*, held that "whether the doing of a certain act, or the failure to do it, in a particular way constitutes due care, or the want of such care, should generally be left to the jury in the light of the evidence. It is only in cases where the facts are undisputed, and where

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only a single inference can be reasonably drawn therefrom, that the court can say, as a matter of law, that a certain course of conduct does or does not constitute reasonable care. 'It is only when the standard of duty is fixed and certain, or where the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law and not of fact.' '' To the same effect is the case of *Town of Albion v. Hetrick* (1883), 90 Ind. 545, 46 Am. Rep. 230. It is clear, under these authorities, that the court in instruction No. 13 above, invaded the province of the jury, unless this court can say that, under the facts of this case, appellant's negligence in the matter of placing its wires in its car in the manner in which it did "was so clear and palpable that no verdict could make it otherwise." Expert evidence was offered by appellee to the effect that the wires should have come in at the end of the car closest to the transformer, but we are not able to say that from this evidence we must necessarily infer that appellant was negligent in taking its wires into said car at the other end thereof. Other objections are urged to this instruction, but inasmuch as the one already pointed out necessitates a reversal of the case the others need not be discussed.

It is also urged that the damages are excessive and that the trial court erred in overruling the motion for judgment on the answers to interrogatories but the conclusion already reached makes unnecessary a discussion of these questions. Judgment reversed with instructions to the court below to grant a new trial.

NOTE.—Reported in 101 N. E. 401. See, also, under (1) 26 Cyc. 1405; (2) 3 Cyc. 170; (3) 2 Cyc. 1046; (4) 26 Cyc. 1503; (5) 26 Cyc. 1491, 1497; (6) 26 Cyc. 1102; (7) 26 Cyc. 1497; 38 Cyc. 1671; (8) 29 Cyc. 645. As to rule of assumption of risk, also as to master's statutory duty to furnish servant safe place to work in and safe appliances, see 131 Am. St. 437. For servant's assumption of risk of danger imperfectly appreciated, see 4 L. R. A. (N. S.) 990. As to assumption of risks of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see 28 L. R. A. (N. S.) 1250.

HAMMOND, ADMINISTRATOR, v. KINGAN & COMPANY,
LIMITED, ET AL.

[No. 7,835. Filed April 4, 1913.]

1. **APPEAL.—Review.—Motion for Judgment on Verdict.—Answers to Interrogatories.**—Questions arising on the action of the trial court in overruling a motion for judgment on the verdict, and in rendering judgment on the answers to interrogatories, involve a consideration of the issues presented by the pleadings, the interrogatories and the general verdict. p. 254.
2. **APPEAL.—Review.—Verdict.—Answers to Interrogatories.—Control.**—A general verdict will control as against the jury's answers to interrogatories, if the latter can be reconciled therewith upon any supposable state of facts provable within the issues formed by the pleadings. p. 254.
3. **TRIAL.—Verdict.—Scope.**—A general verdict for plaintiff is a finding in his favor upon every material allegation of the paragraph of complaint on which such verdict rests. p. 255.
4. **MASTER AND SERVANT.—Injury to Servant.—Proximate Cause.—Assumption of Risk.**—Although the jury's answers to interrogatories show that plaintiff's decedent, whose death is alleged to have been caused by slipping on a greasy floor and thereby coming in contact with a defectively insulated electrical appliance, knew of the dangerous condition of the floor and had assumed the risk of all injuries of which such condition was the sole proximate cause, a recovery is not thereby barred, since if his death resulted proximately from another cause for which defendant's negligence was responsible, he cannot be deemed to have assumed the risk of injury from that source in the absence of knowledge of the danger to which such negligence exposed him. pp. 255, 257.
5. **MASTER AND SERVANT.—Injury to Servant.—Proximate Cause.**—Where the complaint in an action for death of a servant charged defendant with negligence in permitting the floor where decedent was required to work to become slippery, and in installing and operating a motor with uninsulated binding posts in close proximity to decedent's working place, and alleged that decedent's death was caused by a current of electricity communicated to his body from such binding posts, with which he came in contact by falling, and that the fall was caused by the slippery condition of the floor, a verdict for plaintiff is a finding that the two conditions of decedent's working place existed as alleged and were due to defendant's negligence, and that such conditions were the combined proximate cause of the death. pp. 256, 258.

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6. **NEGLIGENCE.—Proximate Cause.—Concurring Causes.—Liability**—Where two causes combine and proximately concur in producing an injury, the party at fault for one of such causes will be held liable, provided the injury would not have occurred in the absence of such fault. p. 257.
7. **MASTER AND SERVANT.—Injury to Servants.—Assumption of Risk.—Negligence of Fellow Servant.**—A servant assumes the risk of injury resulting from the negligence of a fellow servant, but where the negligence of a fellow servant coöperates with the negligence of the master in producing the injury the master is liable. p. 258.
8. **MASTER AND SERVANT.—Injury to Servant.—Verdict.—Answers to Interrogatories.**—Where the complaint alleged that plaintiff's decedent fell upon a floor negligently maintained in a slippery condition, whereby he came in contact with the binding posts of an electric motor negligently maintained in an uninsulated condition, and was killed, answers by the jury to interrogatories showing that the death was proximately due to the slippery floor, but not showing that such was the sole cause, are not in irreconcilable conflict with a verdict for plaintiff on the theory that decedent had assumed the risk incident to the defective condition of the floor. p. 258.

From Marion Circuit Court (17,936); *Charles Remster*, Judge.

Action by George Hammond, administrator of the estate of John Whitely, deceased, against Kingan & Company, Limited, and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Salem D. Clark, Frank S. Roby, Ward H. Watson and E. W. Little, for appellant.

Miller, Shirley, Miller & Thompson, for appellees.

LAIRY, J.—Appellant's decedent was employed by appellee in its packing house as a meat cutter, and while so employed was killed by coming in contact with the uninsulated terminals of a motor located in the plant of appellee and used to operate a saw. The case was tried by a jury which returned a general verdict in favor of appellant. The court submitted to the jury a number of interrogatories which were answered and returned with the general verdict. Ap-

pellant made a motion for a judgment in his favor on the general verdict which motion was overruled. Appellee then moved for a judgment on the interrogatories notwithstanding the general verdict which motion was sustained and judgment rendered accordingly. Appellant excepted to both of these rulings and brings the questions thus presented to this court for review.

The decision of this question involves a consideration of the issues presented by the pleadings, the interrogatories and the general verdict. The complaint filed consisted of four paragraphs, but in view of the conclusion we have reached we need consider only the issues formed upon the second paragraph. If the interrogatories are not in irreconcilable conflict with the general verdict when considered in connection with the issues formed upon this paragraph, the general verdict must stand as against this motion, for it is well settled that the general verdict will be upheld if the interrogatories can be reconciled therewith upon any supposable state of facts provable within the issues formed by the pleadings. *Lake Erie, etc., R. Co. v. Charman* (1903), 161 Ind. 95, 67 N. E. 923; *Union Traction Co. v. Barnett* (1903), 31 Ind. App. 467, 67 N. E. 205. In view of the question presented it is not necessary to set out all of the allegations of this pleading. It alleges in substance that the decedent at the time of his death was in the employ of the defendant and was engaged in cutting meat at a table in its packing house, and that defendant was and had been for some time prior thereto operating a saw on another table by means of an electric motor or dynamo which was placed under a table in close proximity to the place where decedent was required to work. It further appears from such allegations that the binding posts of the motor so placed were negligently left uninsulated and unguarded, and that they carried a current of electricity sufficient to cause death. The complaint also charges that the defendant negligently permitted the floor

to become and remain wet, greasy and slippery at the place where decedent was required to work, and that it negligently installed and maintained the motor with the uninsulated binding posts in close proximity, knowing of the dangerous and slippery condition of the floor and knowing that decedent was likely to fall by reason thereof and come in contact with the exposed and uninsulated binding posts. It is alleged that decedent did not know that the binding posts were uninsulated or unguarded and that he did not know that they carried a dangerous current of electricity, and that defendant failed to warn him of such conditions; but it is not alleged that decedent did not know of the slippery and dangerous condition of the floor. The general

3. verdict returned by the jury is a finding in favor of the plaintiff upon every material allegation of this paragraph of complaint. It finds that the defendant was guilty of the acts of negligence charged, that the plaintiff did not know of the danger to which he was exposed by reason of such negligence, that the negligence charged caused the death of decedent as stated in the complaint, and that the resulting damage was \$5,000. In reviewing the ruling of the trial court upon the motion for judgment on the interrogatories, we are required to determine whether any of the facts found in response to such interrogatories are in irreconcilable conflict with the general verdict in respect to any of the particulars stated.

It is not seriously contended that the answers to

4. interrogatories negative the facts charged in the complaint as constituting negligence on the part of the defendant, but it is contended that such answers show that the slippery condition of the floor was the sole proximate cause of the death of decedent and that he had knowledge of this for a long time prior to his injury and that, as a matter of law, he assumed the risk of any injury caused thereby. The answers to the interrogatories show that decedent had worked for three or four months at the same place

he was working at the time he was injured, and that the floor was habitually in a damp, greasy and slippery condition; that it had been in such a condition during all of the time he had worked there, and that there was nothing to prevent him from knowing the condition of the floor. These facts show conclusively that he did know or should have known of the dangerous condition of the floor and that he assumed the risk of all injuries of which the slippery floor was the sole proximate cause. If the only injuries received by decedent had been such as were occasioned solely by the fall, he could not have recovered, but if his death resulted proximately from another cause for which the negligence of the defendant was responsible, he can not be deemed to have assumed the risk of injury resulting from such cause, unless he knew of the danger to which this particular negligence of the master exposed him.

The paragraph of complaint under consideration, 5. charges that appellee was negligent in two particulars: (1) in permitting the floor where decedent was required to work to become wet, greasy and slippery, and (2) in installing, maintaining and operating the motor with the uninsulated binding posts in close proximity to his working place. According to the allegations of the complaint, the death of decedent was caused by a current of electricity communicated to his body from these uninsulated binding posts with which he came in contact by falling, and his fall was caused by the slippery condition of the floor. It thus appears that the current of electricity would not have caused his death if he had not fallen, and also that the fall would not have caused his death had it not been for the current of electricity to which the uninsulated terminals exposed him. It is apparent, we think, that both of these causes concurred in producing the death of decedent and that in the absence of either such death would not have occurred. The conclusion of the court is that the complaint alleges and the general verdict accordingly finds that two

conditions of the working place of decedent existed, both of which rendered it unsafe, and both of which were due to the negligent conduct of the defendant; and that both of these conditions concurred in producing his death and were thus the combined proximate cause. The subject of concurring proximate causes was considered and discussed in an opinion recently rendered by this court and need not be further discussed in this opinion. *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822.

The answers to interrogatories do not show that decedent had knowledge of the uninsulated condition of the binding posts or that they were charged with a current of electricity sufficient to cause death, and it can not be said that they show that he assumed the risk of injury from that cause.

It has been frequently decided by this and other

6. courts that where two causes combine and proximately concur in producing an injury, the party at fault for one of such causes will be held liable, provided the injury would not have occurred in the absence of such fault. 1 *Thompson*, Negligence §68; *Grimes v. Louisville, etc., R. Co.* (1892), 3 Ind. App. 573, 30 N. E. 200, and cases cited; *Cincinnati, etc., R. Co. v. Worthington* (1903), 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. 355; *Lake Shore, etc., R. Co. v. Wilson* (1894), 11 Ind. App. 488, 38 N. E. 343; *Reid v. Evansville, etc., R. Co.* (1894), 10 Ind. App. 385, 35 N. E. 703, 53 Am. St. 391.

The knowledge of the decedent of the slippery condition of the floor would preclude his representative from recovering for an injury which resulted solely from such

4. condition; but it does not prevent a recovery for an injury which resulted from that cause acting in connection with another cause for which defendant's negligence was responsible, when both causes concurrently and proximately produced the injury and where he did not assume the risk of the latter cause. A servant assumes the risk

of injury resulting from the negligence of a fellow
7. servant, but it has been held that where the negligence
of a fellow servant coöperates with the negligence
of the master in producing the injury the master is liable.
The same principle applies here. *Boyce v. Fitzpatrick*
(1881), 80 Ind. 526; *Pennsylvania Co. v. McCaffrey* (1894),
139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104, and cases cited;
Lutz v. Atlantic, etc., R. Co. (1892), 6 N. M. 496, 30 Pac. 912,
16 L. R. A. 819 and note thereto. The facts stated

5. in the complaint do not justify us in holding that
the slippery condition of the floor was the sole proximate
cause of the injury and the general verdict does not
so find. The answers to interrogatories showing that decedent
knew of such condition or should have known of it are
not in irreconcilable conflict with the general verdict. This
case was probably decided in the trial court upon the authority
of the cases of *P. H. & F. M. Roots Co. v. Meeker* (1905),
165 Ind. 132, 73 N. E. 253, and *Crawford & McCrimmon*
Co. v. Gose (1909), 172 Ind. 81, 87 N. E. 711, both of which
have been expressly overruled by the supreme court. *King*
v. Inland Steel Co. (1912), 177 Ind. 201, 96 N. E. 337, 97
N. E. 529. The other cases cited by appellee in so far as
they follow the doctrine announced in the overruled cases
to which we have referred, can not be regarded as authority.

The jury further finds in answers to interrogatories that
the slippery condition of the floor caused decedent to fall,
that he came in contact with the motor after he fell,
8. and that the death of decedent was due proximately
to the slippery condition of the floor. Appellant contends
that these answers show that the slippery floor was the
proximate cause of the death of decedent and that they
are in irreconcilable conflict with the general verdict. We
think that this contention has already been answered. While
these answers do show that the death was proximately due
to the slippery floor, they do not show that this was the sole
cause, or that some other cause for which appellee was negli-

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gently responsible did not operate concurrently with the slippery condition of the floor in proximately causing the death of decedent. In view of the issues in this case, we think that the facts found by these answers can be reconciled with the general verdict.

The judgment is reversed and the trial court is directed to sustain appellant's motion for judgment on the verdict. Judgment reversed.

NOTE.—Reported in 101 N. E. 385. See, also, under (1) 38 Cyc. 1930; (2) 38 Cyc. 1929; (3) 38 Cyc. 1869; (4) 26 Cyc. 1225; (5) 26 Cyc. 1513; (6) 29 Cyc. 496; (7) 26 Cyc. 1226; (8) 26 Cyc. 1513; 38 Cyc. 1927. As to assumption of risk by servant well aware of it, see 97 Am. St. 893. On the question of servant's assumption of risk from latent danger or defect, see 17 L. R. A. (N. S.) 76. For servant's assumption of risk of dangers created by the master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see 28 L. R. A. (N. S.) 1250. As to negligence of fellow servant concurring with failure of the master to establish or enforce proper rules or regulations for conduct of business, see 4 L. R. A. (N. S.) 516.

MAY ET AL. v. GEORGE.

[No. 7,916. Filed April 4, 1913.]

1. JUDGMENT.—*Construction*.—In construing a judgment reference may be had to the pleadings and to the entire record. p. 261.
2. NUISANCE.—*Abatement*.—*Judgment*.—*Sufficiency*.—Where the complaint in an action for the maintenance of a private nuisance sufficiently described such nuisance, a judgment reciting that "the nuisance set out and described in plaintiff's complaint be abated", is not void for uncertainty, since it may be made certain by reference to the complaint. p. 261.
3. APPEAL.—*Review*.—*Judgment*.—*Failure to Object Below*.—No objection can be presented on appeal to the rendition of a judgment on the verdict, unless by objection in the court below the mistake or defect was pointed out. p. 262.
4. NUISANCE.—*Action to Abate*.—*Evidence*.—*Statute of Limitations*.—In an action for the maintenance of a private nuisance, brought under §291 Burns 1908, §289 R. S. 1881, defining a nuisance to be that which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of prop-

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erty, so as essentially to interfere with the comfortable enjoyment of life or property, evidence that a gutter, into which defendants poured soapsuds and other offensive matter, had been in existence for about fifty years and that defendants had obtained a prescriptive right to maintain the gutter, is insufficient to show that the action is barred by the statute of limitations, where the nuisance shown was a continuing one. p. 262.

5. NUISANCE.—*Abatement.—Limitation of Actions.—Application of Statute.*—Where a nuisance is of a character so permanent that it may fairly be said that the entire damage accrues in the first instance, the statute of limitations begins to run from that time; but if the nuisance may be said to continue from day to day, and create a fresh injury each day, there still may be a right of action for the injuries created within the last six years, though the original right of action has been lost. p. 262.

6. DRAINS.—*Prescriptive Right.—Evidence.*—In an action for the abatement of a nuisance consisting of the pouring of soapsuds and other offensive matter into a gutter, defendant's claim to a prescriptive right to use the gutter, even if obtainable under some circumstances, cannot be sustained, where there was no evidence that such drain had been used for that purpose prior to six years before the bringing of the action. p. 263.

From Perry Circuit Court; *William Ridley*, Judge.

Action by Maggie George against Mary May and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Wm. A. Land, for appellants.

Ewing, Roose & Seacat, for appellee.

IBACH, C. J.—This was an action by appellee against appellants for the maintenance of a private nuisance, asking for damages and an abatement of the nuisance. The complaint shows that the parties are adjoining property owners in the city of Cannelton, Indiana, that the defendants have constructed and maintain an open sewer on their premises which empties into a ditch on Taylor Street above plaintiff's premises, and carries refuse and waste matter from the defendants' premises into said ditch, that defendants for two years emptied all their waste and refuse matter, such as slop, soapsuds, garbage, and all waste prod-

ucts of the body, into their open sewer, and such matter flows out into the open ditch on Taylor Street above plaintiff's real estate, thence down said street and in front of and against plaintiff's premises, thereby causing cesspools of stagnant water, filth, and noxious matter to be deposited in said open ditch and in front of and against plaintiff's real estate, that said deposits render plaintiff's property unhealthy and undesirable as a dwelling house, and has depreciated both its market and its rental value. It is also averred that defendant picked and tore away brick from the foundation of plaintiff's house, thus weakening the foundation, and that through the openings thus formed defendant emptied wash water under said foundation, thus making the earth under the dwelling damp and muddy and causing the sills, sleepers, flooring and walls to mildew, rot and decay. Trial by jury resulted in a verdict for plaintiff, assessing her damages at \$10, and finding that the nuisance alleged in the complaint should abate. The court rendered judgment on the verdict, and the judgment entry is in the following words: "It is therefore considered and adjudged by the court that the plaintiff recover of and from the defendants the sum of Ten Dollars and that the nuisance set out and described in plaintiff's complaint be abated, and that she have judgment against defendants for her costs, laid out and expended."

It is argued that this judgment is void for uncertainty. The rule is that "If the entry of a judgment be so obscure as not to express the final determination of the court

1. with sufficient accuracy, reference may, and indeed ought to, be had to the pleadings, and the entire record, when construing the judgment." *Fleenor v. Driskill* (1884), 97 Ind. 27, 33, and authorities cited. See, also, Freeman, Judgments §45; 11 Ency. Pl. and Pr. 934, 956; 2 Elliott, Gen. Prac. §1019; *Thain v. Rudisill* (1890),
2. 126 Ind. 272, 26 N. E. 46. The present judgment orders the abatement of the nuisance described and

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set out in plaintiff's complaint, and under the rule and the authorities above cited, may be made certain by refer-

3. ence to the complaint. Further, no objection to the judgment was made below, by motion to modify, or in any other manner, and no objection can be presented on appeal to the rendition of a judgment on the verdict, unless by objection, in the court below, the mistake or defect was pointed out. *Tucker v. Hyatt* (1898), 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129; *Cockrum v. West* (1890), 122 Ind. 372, 23 N. E. 140; *Kelley v. Houts* (1903), 30 Ind. App. 474, 66 N. E. 408.

Appellants also argue that the court erred in over-

4. ruling their motion for new trial. Appellants contend that the evidence showed that the cause of action was barred by the statute of limitations. The evi-

5. dence showed that appellee had owned the house in which she lived for less than three years, that the gutter into which the offensive materials were poured, or a similar gutter, had been in existence for about fifty years. So appellants claim that the cause of action arose more than six years before the bringing of the action, also that appellants had obtained by prescriptive right extending over more than twenty years, the right to maintain the gutter. This action was brought under §291 Burns.1908, §289 R. S. 1881, which provides that "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action." The rule is that if a nuisance is of a character so permanent that it may be fairly said that the entire damage accrues in the first instance, the statute of limitations begins to run from that time. But if the nuisance may be said to continue from day to day and create a fresh injury each day, there may still be a right of action for the injuries created within the last six years, though the original right of action has been lost. *Peck v.*

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City of Michigan City (1898), 149 Ind. 670, 683, 49 N. E. 800.

The nuisance alleged in the complaint and proved by the evidence was not the maintenance of the gutter, but the use to which the gutter was put. Merely because there was a drain to carry away water in existence for more than twenty years, it does not follow that appellee could not recover for the obnoxious condition of affairs shown by the complaint, and supported by the evidence, all occasioned by the use made of the gutter by appellants within six years immediately preceding the time the action was begun. Such a nuisance was a continuing one and not barred by the statute of limitations. There was no showing that the drain

6. had been used prior to six years before the bringing of the action for the purposes mentioned in the complaint, therefore there was no evidence which would tend to show a prescriptive right to use the drain for such purposes, even if such a right could under some circumstances be obtained.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 393. See, also, under (1) 23 Cyc. 1101, 1102; (2) 29 Cyc. 1252; (3) 2 Cyc. 703, 705; (4) 29 Cyc. 1206, 1237; (5) 25 Cyc. 1137, 1140. As to the nature and elements of private nuisance, see 118 Am. St. 869. As to the statute of limitations in actions for continuous nuisance, see 20 Am. St. 178.

ALVEY v. WIGGS ET AL.

[No. 7,877. Filed April 15, 1913.]

1. **APPEAL.—Vacation Appeal.—Notice of Appeal.—Dismissal.**—Appellant's failure, in a vacation appeal, to give notice of the appeal in compliance with Rule 36 of the court is cause for dismissal. p. 264.
2. **APPEAL.—Vacation Appeal.—Failure to Give Notice of Appeal.—Waiver.**—Where, prior to the time fixed in appellee's motion to dismiss a vacation appeal for failure to give notice, the appellee entered a full appearance and filed a brief upon the merits, the giving of notice was thereby waived and jurisdiction attached. p. 264.

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3. *APPEAL—Review.—Disposition of Cause.*—Where no error appears in the record, the cause will be affirmed, although a strict compliance with the court rules might warrant a dismissal for imperfections in appellant's brief. p. 265.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by Daniel W. Wiggs and others against John B. Alvey. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

R. W. Armstrong and *B. W. Pickhardt*, for appellant.

Leo H. Fisher and *A. L. Gray*, for appellees.

SHEA, J.—This action was brought by appellees against appellant Alvey for damages for breach of a written contract. The cause was tried on the third paragraph of appellees' complaint, to which a demurrer was overruled. Appellant answered in two paragraphs: (1) general denial; (2) setting up in defense that he tendered back \$100 paid him to bind the contract, which was refused, and he then paid the money to the clerk of the court below. Appellees replied by a general denial to the second paragraph of answer. The issues formed were submitted to a jury for trial, and a verdict for \$375 returned for appellees. Judgment on the verdict. Appellant's motion for a new trial was overruled, exceptions taken and the cause appealed to this court.

The appeal in this case was properly treated as a vacation appeal. Appellees filed a motion to dismiss because of the failure of appellant to give proper notice as

1. required by Rule 36 of this court. This motion was continued until final hearing. At the time made, the motion was well taken, as notice had not been given, and there had been no appearance by appellees. The time fixed by appellees in the motion to dismiss, for the
2. hearing thereof, was April 25, 1911. On April 22, 1911, appellees entered a full appearance, and filed a brief upon the merits. Under the settled practice of

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both this court and the Supreme Court, this was a waiver of notice, and jurisdiction attached. The motion to dismiss the appeal is overruled. Ewbank's Manual §163; *Loucheim v. Seeley* (1896), 151 Ind. 665, 43 N. E. 646; *Hazelton v. DePriest* (1896), 143 Ind. 368, 42 N. E. 751; *Schmidt v.*

Wright (1882), 88 Ind. 56. Very many imperfec-

3. tions in the brief filed by appellant, are pointed out by appellees, some of which are well taken. A strict enforcement of the rules might warrant the court in dismissing the appeal. We have, however, examined the record, and find no reversible error.

The judgment is therefore affirmed.

NOTE.—Reported in 101 N. E. 637. See, also, under (1) 2 Cyc. 873; 3 Cyc. 185; (2) 2 Cyc. 875; (3) 3 Cyc. 418. As to waiver of right of appeal, see 13 Am. Dec. 546.

HENRY, RECEIVER, v. EPSTEIN, BY NEXT FRIEND.

[No. 7,950. Filed April 18, 1913.]

1. APPEAL.—*Review.—Motion for Judgment on Answers to Interrogatories.*—In determining the question presented by a motion for judgment on the jury's answers to interrogatories, the court on appeal will consider only the pleadings, the answers to interrogatories and the general verdict. p. 267.
2. APPEAL.—*Review.—Verdict.—Answers to Interrogatories.—Presumptions.*—In determining the question presented on a motion for judgment on the answers to interrogatories, the court on appeal must assume that there was evidence to support every material averment of the complaint, and unless the answers are irreconcilable with the general verdict on any conceivable state of facts provable under the issues, the general verdict will control. p. 268.
3. RAILROADS.—*Injuries to Persons on Tracks.—Negligence.—Contributory Negligence.—Imputing Driver's Negligence to Person Injured While Riding in Vehicle.*—The negligence, if any, of plaintiff's father in driving his wagon, in which she was riding, across defendant's railroad tracks, cannot be attributed to plaintiff. p. 271.
4. RAILROADS.—*Injuries to Persons on Tracks.—Verdict.—Answers to Interrogatories.*—Where plaintiff was injured by the collision

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of one of defendant's cars with a wagon in which plaintiff was riding with her father, who was the driver, answers by the jury to interrogatories, to be sufficient to warrant the court in setting aside the verdict for plaintiff, must affirmatively show either that plaintiff's injury did not result from any of the negligent acts of defendant charged in the complaint as being the proximate cause thereof, or that the negligence of plaintiff's father in driving across the track in front of the car was the sole proximate cause of her injury, rather than a concurring cause. p. 271.

5. RAILROADS.—*Injury to Persons on Tracks.—Verdict.—Answers to Interrogatories.*—In an action for injuries to plaintiff by the collision of defendant's car with a wagon in which plaintiff was riding with her father, who was the driver, a verdict for plaintiff is not affected by answers to interrogatories that could only affect the question of negligence of plaintiff's father in driving onto the track. p. 271.
6. RAILROADS.—*Interurban.—Injury to Persons on Tracks.—Verdict.—Answers to Interrogatories.*—Where, under the averments of the complaint, in an action for injuries sustained through the collision of an interurban car with a wagon in which plaintiff was riding with her father, who was driving, plaintiff was entitled to prove excessive speed of the car before the collision, and other facts from which the jury could infer that the motorman did not have the car under proper control when plaintiff's father first drove upon the track, so that the motorman's later efforts could not prevent the collision that followed, answers to interrogatories showing that at the time of the collision the speed of the car was not excessive, and that as soon as plaintiff's father started across the track the motorman sounded the gong and whistle and thereafter did everything in his power to prevent collision, will not control a verdict for plaintiff. p. 272.
7. RAILROADS.—*Interurban.—Injuries to Persons on Tracks.—Proximate Cause.—Answers to Interrogatories.*—Where plaintiff was injured by an interurban car while proceeding along the highway in a wagon with her father, answers by the jury to interrogatories showing that plaintiff's father was driving along the south side of the road, and that while so driving, a few minutes prior to the accident, plaintiff and her father saw a car about 1400 feet ahead of them approaching on the south track, and that plaintiff's father then immediately turned his horses across the north track, on which the car that collided was approaching, the court cannot say as a matter of law that the act of plaintiff's father in suddenly turning the wagon onto the north track was the sole proximate cause of plaintiff's injury. p. 273.
8. NEGLIGENCE.—*Proximate Cause.—Jury Question.*—The question of proximate cause, whether it relates to the negligence of plain-

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tiff or to that of defendant, is primarily a question of fact for the jury. p. 275.

9. *APPEAL.—Review.—Answers to Interrogatories.—Decision in Companion Case.—Effect.*—Where, under the averments of the complaint in an action for injuries sustained in a collision with an interurban car, the same facts and acts of negligence may have been proved that were proved in another action growing out of the same collision, and which has been decided on appeal, and the jury's answers to interrogatories in the present case are not inconsistent with the facts of the former case, such former case will in a measure be controlling in the one before the court. p. 275.

From Superior Court of Marion County (79,277); *Clarence E. Weir*, Judge.

Action by Libbie Epstein, by her next friend, Ida Epstein, against Charles L. Henry, receiver of the Indianapolis and Cincinnati Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Elam & Fesler and *Claude Cambern*, for appellant.

Alvah J. Rucker, *James E. Rocap* and *Oliver A. Hackney*, for appellee.

HOTTEL, J.—This is an action by appellee against appellant to recover damages for injuries alleged to have been sustained in a collision by one of appellant's cars with a wagon in which appellee was riding. The complaint is in one paragraph. The only answer was a general denial. There was a trial by jury, resulting in a verdict in favor of appellee for \$200, with which verdict the jury returned answers to interrogatories. Appellant moved for judgment on said answers which motion was overruled and exceptions saved. This ruling is the only error assigned and relied on for reversal.

In determining the question presented by this motion this court will consider only the pleadings, the answers to interrogatories and the general verdict. *Indianapolis*

1. *Southern R. Co. v. Emmerson* (1913), 52 Ind. App. 403, 98 N. E. 895, 899 and authorities there cited.

“Every presumption is indulged in favor of the general verdict and it is only where a conflict between such answers and the general verdict is irreconcilable on any supposable state of facts provable under the issues, that such answers will control.” *Indianapolis Southern R. Co. v. Emmerson, supra*, and authorities there cited; see, also, *Wabash R. Co. v. Keister* (1904), 163 Ind. 609, 67 N. E. 521. In determining the question here presented, under the authorities just cited, we must assume that every material averment of the complaint had some evidence to support it. A condensed recital of these averments, necessary to render intelligent the questions discussed, follows: Appellee, at the time of her injury, was eleven years old and was with her father being conveyed in a one-horse covered huckster wagon fifteen feet long and six feet wide over and upon Prospect Street, a public thoroughfare running in an easterly and westerly direction in the city of Indianapolis and much used and frequented by the citizens of such city; that at said time appellant’s traction company and Henry, as receiver thereof, maintained in said street two interurban railway tracks running parallel with each other east and west and about five feet apart, the rails of such tracks extending above the street some six inches; that over these tracks said Henry as receiver was then operating one of its interurban cars outbound east over the south track in said street, and another interurban car, inbound, west over the north track of said street, each of said cars projecting some two feet over either side of said track; that the appellee was injured by a collision with appellant’s westbound car running north at a point in said street where the two car tracks converge and pass under the Prospect Street viaduct of the belt railroad; that upon either side of said street and tracks at the point where appellee was injured and for a distance of 150 feet in either direction, east or west, there was a perpendicular wall some fifteen feet high; that at and near the point where appellee was

injured the street was so narrow that this wall was only three feet from the near rail of appellant's track on either side of said street; that great noise was made by trains passing over the viaduct of said belt railroad; that "shortly" before appellee's injury her father, who was in charge of said horse and wagon and wholly responsible for its management and control, was driving west in front of one of appellant's westbound cars within or partly within the track over which such car was being operated; that appellee and her father were at all times riding with their backs toward said approaching car and were unconscious and ignorant of its approach; that at the time of said collision "and for a period of five minutes more or less prior thereto the appellant was operating said car at 'the negligent rate of speed of thirty-five miles more or less per hour'; that by reason of the elevation of said rails of said track six inches above the street, they were unable to turn toward the south; that for a distance of 300 feet more or less from the place of said collision said wagon was being driven partly in said north track; that when they were '150 feet more or less' from the place of collision they saw an interurban car coming east on the south track; that the father then turned the horse on the north track, and that appellant negligently struck with its car the wagon," etc.

It is also averred that the appellant saw and knew or negligently failed and omitted to see and know all of the conditions and situation of road, tracks and cars thereon above described and appellee's situation and surroundings including the character of her wagon and the fact that the wagon in which she was riding was in or partly within the north track over which said car was approaching, and the respective distances of the walls, rails and tracks from and in relation to each other, "and the dangers imposed on plaintiff by the conjunction of all of such conditions and by each of them separately"; that appellants having such knowledge negligently omitted to check or stop said car,

and negligently failed to sound the gong on said car; that appellee's injuries were the proximate result of each and all of said acts of negligence. The facts found by the jury are, in narrative form, as follows: Appellee was hurt in a collision, January 3, 1908, between appellant's car and a wagon driven by appellee's father, near the Prospect Street viaduct of the belt railroad. The traction company has two lines of track running east and west in the roadway where the collision occurred. The north track of said railway is known as the inbound, and the south track as the outbound line. Appellee was riding in a huckster wagon, with the top, sides and back of the wagon covered. Appellee was sitting on a seat with her father in the front part of the wagon. The father was driving west from his home in Norwood into the city of Indianapolis along an extension of Prospect Street, between Norwood and said city, and had so driven for several squares prior to the accident along the left or south side of the roadway for several hundred feet immediately prior to the accident. The collision occurred near the bottom of an incline or hill in the road, and it was about 600 feet from the bottom to the top of said hill. The hill was 21 feet high. Appellee and her father saw a car about 1400 feet in front of them coming out of the city on the south track a few minutes prior to the accident. The father was at this time driving along the south side of said roadway, and upon seeing said car, some 1400 feet distant, immediately turned his horse to the north and across the inbound or north track in said road. The wagon in which appellee was riding was struck by a car coming from the east on the north track, while the horse was being driven across said north track. The collision occurred about the foot of the hill. The car was within 50 to 100 feet of said wagon when it was turned across the north track. The motorman rang his gong and blew his whistle as soon as appellee's father started to drive across the north track. The motorman reversed his power and ap-

plied his emergency brake when said wagon started across to the north side of the street. At the time of the collision the speed of said car was 10 miles per hour, and the car stopped within 15 to 20 feet after the collision. The wagon was struck by the car immediately after it got on the north track. An outbound car came up to the place of the accident on the south track from the west 3 to 5 minutes after the accident. There was no car at the place of the accident except the car in the collision.

It is well settled that the negligence of appellee's father, if any, in driving his horse and wagon across appellant's tracks, cannot be attributed to appellee. *City of Jef-*

3. *ersonville v. McHenry* (1899), 22 Ind. App. 10, 14, 53 N. E. 183; *City of Evansville v. Senhenn* (1898), 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728, 68 Am. St. 218; *Wabash R. Co. v. McNown* (1913), *ante* 116, 39 N. E. 126, 100 N. E. 383, and authorities there cited. It

follows from these holdings that before we will be

4. authorized to order judgment on the answers to in-

terrogatories, we must be convinced that the answers thereto affirmatively show either that appellee's injury did not result from any of the negligent acts of appellant charged in the complaint as being the proximate cause thereof, or we must find what is in effect the same thing viz., that the negligence of appellee's father in driving across the track in front of the appellant's car which collided with his wagon, was the sole proximate cause of appellee's injury rather than a concurring or contributory cause.

Appellant urges (1) that the complaint alleges that appellee's father, as an excuse for turning his horse over on to the north track, saw a car coming towards them

5. on the south track only 150 feet away, and that the

jury in its answers found that this car was 1,400 feet away and did not come up to the scene of the accident until from 3 to 5 minutes after it occurred. This averment and the answers of the jury with reference thereto, could

only affect the question of negligence of appellee's father and might be important for the purpose of determining whether the father was guilty of contributory negligence, if the suit were by him, but inasmuch as appellee cannot be charged with her father's negligence, the general verdict will not be affected by this answer.

It is further insisted: (1) That the complaint charges that the car which struck appellee's wagon was running 35 miles an hour and that the jury finds that it was running only ten miles an hour and stopped within fifteen of twenty feet after striking the wagon. (2) That the complaint charges that no warning was given of the approach of the car, and that the jury finds that the motorman blew his whistle and rang his gong as soon as appellee's father started to drive across the north track. (3) That the complaint charges that "for 300 feet before the accident happened the appellee's wagon was being driven with one wheel on the north track * * *, and that the motorman could see appellee's peril for 300 feet, but the jury finds that the wagon was being driven for several hundred feet immediately prior to the accident along the south side of the street, and that the car was within 50 to 100 feet of the plaintiff's wagon when it was turned across the north track and that the wagon was struck immediately after it got on the north track." (4) "That the complaint charges that the motorman negligently failed to stop his car after he saw appellee's peril, but the jury finds that the motorman reversed his power and applied his emergency brake when said wagon started across to the north side of said street."

These answers find the speed of the car *at the time of the collision* and that the motorman rang his gong and blew his whistle *as soon as appellee's father started to*

6. *drive across the track, and thereafter* did everything in his power to prevent the collision; but there are no answers that show the speed of the car *before* the collision, and from the time the car first came in view of appel-

lee's wagon to the time of the collision, and none that show any sounding of the gong or blowing of the whistle or any effort on the part of the motorman to warn appellee and her father of the approach of said car *before* the father turned his horse across the north track. Under the averments of the complaint, appellee was entitled to prove, and for the purposes of the question under consideration we must assume that she did prove excessive speed of the car before the collision, and other facts from which the jury had a right to infer that the motorman did not have his car under proper control when appellee's father first turned his horse across the north track, and that the speed of such car and the negligent failure of the motorman to have his car under such control as ordinary prudence would suggest, in view of the situation and surroundings there existing, made it impossible for his later efforts and diligence to prevent the collision that followed. The facts provable under the averments of this complaint render ineffective, for the purpose of overthrowing the general verdict, answers to interrogatories which show only an absence of negligence on the part of appellant's motorman *after the appellee's peril became certain*, and make the case easily distinguishable, in this respect, from the cases of *Wabash R. Co. v. Keister, supra*; and *Cleveland, etc., R. Co. v. Moore* (1909), 45 Ind. App. 58, 90 N. E. 93, quoted from and relied on by appellant.

It is further claimed by appellant, in effect, that the
7. answers to interrogatories show that the wagon in which appellee was riding was suddenly driven by her father from a place of safety at the side of the track onto the track in front of the car, and that this was the independent proximate cause of appellee's injury; that the appellant's motorman was not required to anticipate that the driver of such wagon would suddenly turn it in front of such car. To support this contention appellant relies on the following cases: *Indianapolis St. R. Co. v. Schmidt*

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(1905), 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; *Columbus St. R., etc., Co. v. Reap* (1907), 40 Ind. App. 689, 82 N. E. 977; *Kessler v. Citizens St. R. Co.* (1898), 20 Ind. App. 427, 50 N. E. 891; *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 77 N. E. 945; *Missouri Pacific R. Co. v. Hansen* (1896), 48 Neb. 232. Appellant assumes more than the answers of the jury justify. It assumes that the wagon was *suddenly* turned from a place of safety on the side of the track in front of the car. The answers of the jury as above indicated show that the father was driving along the *south side of said roadway*. The wagon may have been at the *south side* of such roadway and, under the averments of the complaint, may have had one wheel on the south side of said track or so near thereto as not to be out of danger from said car, and near enough to said track to suggest to such motorman the necessity of putting his car under control. The answers further show that while so driving along the south side of said track the appellee and her father *a few minutes prior to the accident* saw a car about 1400 feet ahead of them coming out of the city on the south track, and that he then *immediately* turned his horse across the north track. According to this answer the assumption of a *sudden* turning of the wagon on the track is not justified. It could not have been very sudden if the wagon was struck "*immediately*" after it got on the track and the horse was turned to the north and across the track "*immediately*" after the appellee and her father saw the car coming on the south track, "*a few minutes prior to the accident.*" Another answer shows that the car was 50 to 100 feet away when the wagon was turned across the north track. These answers will not justify the court in declaring as a matter of law that the sudden turning of said wagon onto said track by the father was the sole proximate cause of appellee's injury.

In the case of *Indianapolis St. R. Co. v. Schmidt, supra*, relied on by appellant, this court said (pp. 207-209): "The

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question of proximate cause is the same whether it
 8. relates to the negligence of the plaintiff or defendant,
 and in either case it is primarily a question of fact
 for the jury. * * * Had the approaching street car
 been in such proximity as that the act of appellee in turn-
 ing across the track amounted to a casting of himself in front
 of it, then such negligent act would be the clear proximate
 cause of the injury, and bar him from recovery.” See,
 also, *Chicago, etc., R. Co. v. Martin* (1903), 31 Ind. App.
 308, 65 N. E. 591; *Moran v. Leslie* (1904), 33 Ind. App. 80,
 70 N. E. 162; *Citizens St. R. Co. v. Helvie* (1899), 22 Ind.
 App. 515, 53 N. E. 191; *Kessler v. Citizens St. R. Co., supra*.

Under the averments of the complaint in this case the
 same facts and acts of negligence may have been proven,
 and we therefore assume they were proven, which
 9. were proven in the case of *Henry v. Epstein* (1912),
 50 Ind. App. 660, 95 N. E. 276. The answers of the
 jury to the interrogatories are not necessarily inconsistent
 with such facts, and hence that case is in a measure control-
 ling in this.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 647. See, also, under (1) 38 Cyc.
 1930; (2) 38 Cyc. 1928, 1929; (3) 33 Cyc. 984, 1015; 29 Cyc. 548;
 (4) 33 Cyc. 1142; (5) 33 Cyc. 1142; 38 Cyc. 1928; (6) 33 Cyc.
 1142; 38 Cyc. 1927; (7) 33 Cyc. 830; 29 Cyc. 641; (8) 29 Cyc.
 639; (9) 11 Cyc. 746. As to imputed negligence in the case of one
 riding in vehicle driven by another, see 110 Am. St. 280.

ROOKER ET AL. v. LUDOWICI CELADON COMPANY.

[No. 7,783. Filed January 21, 1913. Rehearing denied
 April 18, 1913.]

1. PLEADING.—*Complaint.—Sufficiency.—Initial Attack on Appeal.*—
 A complaint, questioned for the first time on appeal, is sufficient,
 if there is not a total failure to state some element essential to
 recovery, and facts are stated sufficient to bar another action for
 the same cause. p. 277.

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2. **MECHANICS' LIENS.—Foreclosure.—Complaint.—Sufficiency.**—A complaint for the foreclosure of a mechanic's lien, alleging that defendants are indebted to plaintiff in a certain sum for labor performed and material furnished at defendants' special instance and request in the erection of a certain dwelling house upon certain described real estate, that such material was furnished and the labor performed within sixty days next preceding the filing of notice of intention to hold a mechanic's lien, etc., and making a copy of the notice a part thereof, was sufficient as against attack made for the first time on appeal. p. 278.
3. **PLEADING.—Complaint.—Sufficiency.**—The objection that the action is upon a written instrument, and that neither the original nor a copy thereof is made a part of the complaint, is unavailing, where such objection does not appear upon the face of the pleading. p. 278.
4. **MECHANICS' LIENS.—Foreclosure.—Complaint.—Initial Attack on Appeal.—Special Findings.**—Where, in an action to foreclose a mechanic's lien, there was a special finding of facts by the trial court, objections urged to the sufficiency of the complaint on the ground that it contained no bill of particulars, that the exhibit of the complaint was not properly identified, and that there is a variance between the description of the real estate in the notice and the complaint, were cured by such finding as against attack made for the first time on appeal. p. 278.
5. **APPEAL.—Review.—Objections to Pleadings.—Amendments Deemed Made.**—Objections on account of defects in the pleadings that might have been remedied in the lower court, when raised on appeal, will be deemed to have been so remedied. p. 278.
6. **MECHANICS' LIENS.—Creation of Lien.—Statutes.**—Both the title and the text of the act of 1909 (Acts 1909 p. 295) are amply sufficient to give a lien to contractors and subcontractors who comply with the provisions of the act. p. 279.
7. **APPEAL.—Record.—Questions Reviewable.—Evidence.**—Where the transcript of the evidence is not in the record, there is no question before the court as to the sufficiency of the evidence. p. 280.
8. **APPEAL.—Presenting Questions for Review.—Conclusions of Law.**—Error in the conclusions of law on a special finding of facts can only be considered when exceptions are duly reserved thereto and the error is presented by independent assignment on appeal. p. 280.
9. **NEW TRIAL.—Grounds.—Error in Conclusions of Law.**—Error in a conclusion of law on a special finding of facts is not cause for a new trial. p. 280.

From Hamilton Circuit Court; *John F. Neal*, Special Judge.

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Action by the Ludowici Celadon Company against William V. Rooker and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

William V. Rooker, for appellants.

Shirts & Fertig, for appellee.

FELT, P. J.—This is an action by appellee against appellants to foreclose a mechanic's lien. Upon request, the court made a special finding of facts and stated its conclusions of law thereon. Appellants each filed a motion for a new trial which was overruled. Exceptions were reserved, both upon the conclusions of law and the overruling of the motion for a new trial. From a judgment in favor of appellee this appeal was prayed and granted. The motion for a new trial assigned reasons as follows: (1) The finding of the court is not sustained by sufficient evidence; (2) is contrary to law; (3) the court erred in each, the first, second and third conclusions of law. The errors assigned are: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling each of the separate motions for a new trial.

Under the rule frequently announced and followed, a complaint questioned for the first time, on appeal, will be

held sufficient if there is not a total failure to state

1. some essential element of the right of recovery, and facts are stated sufficient to bar another suit for the same cause of action. After verdict, or the finding of the court, all intendments and presumptions in such cases, are in favor of the pleading. The decision of the trial court, or verdict of the jury, cures all other defects and such complaint is sufficient to support the judgment rendered thereon. *Oliver Typewriter Co. v. Vance* (1911), 48 Ind. App. 21, 95 N. E. 327. The amended complaint upon which the case was tried, in substance, charges that appellee is a corporation; that appellants are indebted to it in the sum of \$465.43 for labor performed and materials furnished by appellee at

their special instance and request in the erection of a certain dwelling house upon certain real estate, described; that said materials were furnished and labor performed within sixty days next preceding September 28, 1909; that on said day, appellee filed in the office of the Recorder of Hamilton County, Indiana, a notice of its intention to hold a mechanic's lien for said sum on the dwelling house and real estate so described, "a copy of which is filed herewith as a part thereof"; that appellee holds a lien on said dwelling and real estate for the amount of said debt, which is due and unpaid; that a reasonable attorney's fee for appellee's counsel is \$75. Immediately following the complaint, is what purports to be a copy of the notice of appellee's intention to hold a lien.

It is contended that the complaint is insufficient

2. to warrant a foreclosure and is bad for want of a bill of particulars; that the exhibit, the copy of the lien, is not properly identified; that the suit is upon a
3. written instrument other than the notice and neither the original nor a copy thereof is made a part of the complaint. The last objection does not appear
4. upon the face of the pleading and is therefore unavailing. The objections are not well taken for the

complaint states facts sufficient to bar another action. Furthermore, there was a special finding of facts and under the assignment questioning the sufficiency of the complaint for the first time on appeal, all the objections urged are cured by such finding. *Kenner v. Whitelock* (1899), 152 Ind. 635, 636, 53 N. E. 232; *Searles v. Little* (1899), 153 Ind. 432, 435, 55 N. E. 93; *State Bldg., etc., Assn. v. Brackin* (1901), 27 Ind. App. 677, 681, 62 N. E. 91; *Cummings v. Girton* (1898), 19 Ind. App. 248, 251, 49 N. E. 360. For the same reason the objection that there is a variance be-

- tween the descriptions of the real estate in the notice
5. and the complaint is not available. Furthermore, objections on account of defects in the pleadings

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that might have been remedied by amendment in the lower court, when raised on appeal will be deemed to have been so remedied. *Ades v. Levi* (1894), 137 Ind. 506, 37 N. E. 388; *City of South Bend v. Turner* (1901), 156 Ind. 418, 421, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. 200.

The appellant also contends that the court erred in 6. rendering judgment of foreclosure. It is not claimed that the act of 1909 (Acts 1909 p. 295) is unconstitutional, but appellant says: "While the general assembly may affirmatively create liens, it cannot do so by merely presupposing that such liens already exist and accordingly legislating concerning them." It is argued that both the title and body of the act are insufficient to warrant the enforcement of mechanics' liens in favor of contractors or subcontractors for the alleged reason that the act makes no provision for the creation of any liens and only assumes to make provision for such liens as already exist. We cannot agree with this contention but hold that both the title and text of the act are amply sufficient to give liens to contractors and subcontractors who comply with the provisions of the statute. *Republic Iron, etc., Co. v. State* (1903), 160 Ind. 379, 382, 66 N. E. 1005, 62 L. R. A. 136; *South East, etc., R. Co. v. Evansville, etc., R. Co.* (1907), 169 Ind. 339, 344, 82 N. E. 765, 13 L. R. A. (N. S.) 916, 14 Ann. Cas. 214; *Western Union Tel. Co. v. Braxtan* (1905), 165 Ind. 165, 167, 74 N. E. 985; *Knight & Jillson Co. v. Miller* (1909), 172 Ind. 27, 40, 87 N. E. 823, 18 Ann. Cas. 1146. While we deem the language plain and unambiguous, yet if any light was needed from sources other than the act itself, former legislative enactments on the subject of mechanics' liens and the judicial interpretation thereof preceding the act of 1909, would afford ample and legitimate proof that the legislature clearly intended to make provision for such liens in favor of contractors and subcontractors. *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 90 N. E. 68, 91 N. E. 503, 30 L. R.

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A. (N. S.) 85; *Greenbush Cemetery Assn. v. Van Natta* (1912), 49 Ind. App. 192, 94 N. E. 899.

The alleged insufficiency of the evidence is not before this court, for the reason that there is no transcript of the evidence in the record. The alleged errors in the

7. trial court's conclusions of law are assigned as causes for a new trial, but are not assigned as errors in this court and cannot therefor avail appellants unless

8. they are proper grounds for a new trial. This is no longer an open question for it has been held many times that error in the conclusions of law on a special finding of facts can only be considered when exceptions are duly reserved thereto and such errors are by independent assignment presented to the court of appellate jurisdiction.

Also that error in a conclusion of law on a special

9. finding of facts is not cause for a new trial. This is so held for the reason that when the finding of facts covers the issues the court bases its conclusions of law upon the facts so found, and an error of law in stating such conclusions may be corrected without a new trial or further examination of the facts than may be had from the special finding. A new trial involves a reëxamination of the facts and the questions of law incident thereto. An error in the conclusions of law stated upon a special finding of facts is not an error of law occurring at the trial within the meaning of the statute, specifying the grounds upon which a new trial may be granted. *Peden's Admr. v. King* (1868), 30 Ind. 181, 183; *Montmorency Gravel Road Co. v. Rock* (1872), 41 Ind. 263, 268; *Cruzan v. Smith* (1872), 41 Ind. 288, 293; *Selking v. Jones* (1876), 52 Ind. 409, 410; *Clayton v. Blough* (1884), 93 Ind. 85, 93; *Pfau v. State, ex rel.* (1897), 148 Ind. 539, 543, 47 N. E. 927; *Cincinnati, etc., R. Co. v. Cregor* (1898), 150 Ind. 625, 630, 50 N. E. 760; *Nelson v. Cottingham* (1899), 152 Ind. 135, 139, 52 N. E. 702; *Celtic Sav., etc., Assn. v. Curtis* (1909), 43 Ind. App. 363, 367, 87 N. E. 660.

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No available error is shown by the record and the judgment is therefore affirmed.

NOTE.—Reported in 100 N. E. 469. See, also, under (1) 31 Cyc. 770; (2) 27 Cyc. 367; (3) 31 Cyc. 322; (4) 31 Cyc. 763, 777; (5) 31 Cyc. 766; (6) 27 Cyc. 83, 96; (7) 3 Cyc. 166; (8) 2 Cyc. 730; (9) 29 Cyc. 772. As to who is a laborer within the meaning of mechanics' lien statutes, see 32 Am. Rep. 264.

THE BALTIMORE AND OHIO RAILROAD COMPANY
v. PECK.

[No. 7,906. Filed April 22, 1913.]

1. RAILROADS.—*Damage to Property.—Fire.—Instructions.*—Instructions, in an action against a railroad company for damages from fire, that if the fire which destroyed plaintiff's land occurred before the fire which escaped from defendant's right of way, the defendant need not account for the origin of the fire which destroyed plaintiff's property, and that if defendant negligently permitted fire to escape, the jury could not find against it, if it further found that plaintiff's land was burned over by a fire which occurred prior to the fire which defendant allowed to escape, correctly stated the law applicable to the facts as assumed therein. p. 283.
2. APPEAL.—*Review.—Refusal of Instructions.*—The rejection of instructions applicable to facts in support of which there was some evidence, and which fairly state the law, constitutes reversible error, unless they were covered by other instructions given, or it appears that the substantial rights of the appellant were not prejudiced by such refusal. p. 283.
3. TRIAL.—*Instructions.—Special Instructions.*—The giving of a general instruction does not authorize the refusal of a particular instruction applicable to the issues and the evidence, but a party is entitled, upon proper request, to have an instruction given on his own theory of the case, if there is evidence fairly tending to support it. p. 284.
4. APPEAL.—*Review.—Harmless Error.—Refusal of Instructions.*—In an action against a railroad company for damages from fire, the refusal of instructions that if the fire which destroyed plaintiff's property occurred before the fire which escaped from defendant's right of way, the defendant would not be liable, was harmless, where the jury specially found that the fire on plain-

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tiff's land occurred after the escape of the fire from defendant's right of way. p. 284.

5. TRIAL.—*Instructions*.—Instructions must be relevant to the issues and pertinent to the evidence, and, unless they are, their giving is reversible error, where it does not clearly appear that the complaining party was not harmed thereby. p. 285.
6. RAILROADS.—*Damage to Property*.—*Fire*.—*Instructions*.—In an action against a railroad company for damages from fire, an instruction on the measure of damages, which included statements of the measure of damages, on items outside the issues and the evidence, and also told the jury that it might add interest "to any such element of damages as the jury may see fit to award damages for," was misleading and erroneous. p. 285.

From Porter Superior Court; *A. D. Bartholomew*, Judge.

Action by Egbert A. Peck against The Baltimore and Ohio Railroad Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

W. H. Dowdell, Bomberger, Sawyer & Curtis, and *Calhoun, Lyford & Sheean*, for appellant.

Frank B. Parks, D. E. Kelly and *Walter Fabring*, for appellee.

ADAMS, J.—The complaint in this action charges that on or about October 1, 1908, appellant negligently permitted and caused to be gathered on its right of way in section 6, township 35, range 4 west, in Laporte County, Indiana, large quantities of combustible material, and set fire to the same; that appellant negligently permitted said fire to escape from its right of way to other lands in said section 6, south of its right of way, and negligently permitted said fire to escape from said lands to the lands of one Nicholas W. Box, and from the lands of said Box to the adjoining lands of appellee in Porter County; that by reason of the negligence of appellant, in permitting said fire to escape, the same burned over the lands of appellee to a depth of two feet, whereby appellee was damaged in the sum of \$1990. Trial by jury, verdict and judgment for appellee in the sum of \$1300. Appellant's motion for a new trial was overruled, and this ruling constitutes the only error assigned.

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One of the issuable facts in the case was whether appellee's land was burned over by the fire which was permitted to escape from appellant's right of way on or about October 1, 1908, as charged in the complaint, or by a fire occurring at an earlier date. As to this issue, there was a conflict in the evidence, ten witnesses testifying that appellee's land was burned over during the early part of September, 1908, and other witnesses testifying that said land was burned over after October 1, 1908.

The court refused to give instructions Nos. 2 and 3 tendered by appellant. These instructions were as follows:

No. 2. "If the fire which destroyed the plaintiff's

1. land occurred before the fire which escaped from defendant's right of way in section 6 in Laporte County, the defendant need not account for the origin of the fire which destroyed plaintiff's property, and, under such a state of the evidence, you must find for the defendant."

No. 3. "If you find from the evidence that the defendant negligently set fire to land in section 6 in Laporte County, on or about October 1, 1908, you cannot find against the defendant in this cause, if you further find from the evidence that plaintiff's land was burned over by a fire which occurred prior to the said fire which defendant allowed to escape in Laporte County." The rejected instruc-

2. tions fairly state the law, as applied to the facts assumed therein. As there was evidence tending to prove such facts, the instructions were relevant, and failure to give the same to the jury must be held reversible error, unless said instructions were covered by other instructions given, or that the substantial rights of appellant were not prejudiced by such failure.

Appellee does not seriously contend that the instructions tendered and refused were not relevant, but insists that the first instruction given by the court of its own motion, namely, that before the plaintiff can recover, he must prove the material averments of his complaint by a fair prepon-

derance of the evidence, was in effect the same as the instructions tendered and refused. In this, we think, appellee

is clearly in error. The first instruction given by the

3. court was a general instruction required by statute to be given in every case. The giving of a general instruction does not authorize the refusal of a particular instruction, applicable to the issues and the evidence. *Fleming v. State* (1894), 136 Ind. 149, 154, 36 N. E. 154. A party upon a proper request is entitled to have an instruction given on its own theory of the case, if there is evidence fairly tending to support it. 2 Elliott, Gen. Prac. §899.

The instructions tendered by appellant and refused by the court were supported by evidence, were within the issues, and were expressive of appellant's theory of

4. the case. But appellee further insists that the failure to give the instructions requested was harmless, for the reason that the jury, by its special verdict, found that the fire on appellee's lands occurred between the first and fifth of October, 1908. In the light of this special finding appellee's contention must be sustained. *Muncie Pulp Co. v. Hacker* (1906), 37 Ind. App. 194, 209, 76 N. E. 740.

Complaint is also made by appellant of instruction No. 8, given by the court of its own motion, on the ground that said instruction includes elements not within the issues, and not supported by any evidence. Instruction No. 8 is in the words following: "If you find for the plaintiff, it will be your duty to assess his damages for such items, if any, as he is entitled to recover for. The measure of damages, if a party is entitled to recover for an injury to his own real estate, is the difference, if any, between the fair cash market value of the land immediately before the fire, and its fair cash market value immediately thereafter. If a party is entitled to recover for matured crops burned on rented lands, the measure of damages is the fair cash market value of the crops at the time and place and in the condition

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where burned. If a person is entitled to damages for an injury to pasture land, the measure of damages therefor is the difference, if any, between the cash rental value of such pasture land immediately before the fire and the cash rental value of such lands after the fire. To any such element of damages as the jury may see fit to award damages for, they may or may not, as they see fit, add interest at the rate of six per cent per annum from the time of the burning of the property to date.” The items of damage set out in the complaint are for burning over land \$1790, for burning grove of trees and standing grass \$100, for burning 100 rods of fence \$100. There was no demand for loss of matured crops or pasture lands, and there was no evidence that any matured crops were burned. There was no evidence of any trees burned, and no evidence of the rental value of any pasture land destroyed. It is a well-

5. established rule that instructions must be relevant to the issues and pertinent to the evidence, and, if an instruction is given concerning facts not supported by any evidence, or outside of the issues joined, the giving of such instructions will be reversible error, unless it clearly appears that the complaining party was not harmed thereby. *Indiana R. Co. v. Maurer* (1903), 160 Ind. 25, 31, 25 N. E. 156; *Hanes v. State* (1900), 155 Ind. 112, 118, 57 N. E. 704; *Robinson v. State* (1899), 152 Ind. 304, 308, 53 N. E. 223; *Blough v. Parry* (1896), 144 Ind. 463, 470, 40 N. E. 70, 46 N. E. 560; *McKeen v. Porter* (1893), 134 Ind. 483, 490, 491, 34 N. E. 223; *Lindley v. Sullivan* (1893), 133 Ind. 588, 593, 32 N. E. 738, 33 N. E. 361; *Nicklaus v. Burns* (1881), 75 Ind. 93, 97. We cannot say that the giving of

6. instruction No. 8 was harmless. It was in part, not only outside of the issues and the evidence, but told the jury that “to any such element of damages as the jury may see fit to award damages for” interest might be added. From this instruction the jury might have assumed that

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it was not limited to the evidence in assessing damages, but might award damages as it saw fit.

The judgment is reversed, with instructions to the trial court to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 101 N. E. 674. See, also, under (1) 33 Cyc. 1398; (2) 38 Cyc. 1703; (4) 38 Cyc. 1817; (5) 38 Cyc. 1612; (6) 33 Cyc. 1401. As to constitutionality of statutes requiring equipment of locomotives with spark-arresters and making communication of fire *prima facie* evidence of negligence, see 62 Am. St. 171.

KNICKERBOCKER ICE COMPANY v. SURPRISE.

[No. 7,482. Filed February 2, 1912. Rehearing denied June 29, 1912. Transfer denied April 22, 1913.]

1. **INJUNCTION.**—*Inadequacy of Remedy at Law.*—*Complaint.*—*Sufficiency.*—A complaint, alleging that plaintiff is the owner of certain real estate, a part of which is covered by water on which ice forms, that defendant is engaged in cutting and removing ice, that from time to time in past years the defendant has cut and removed ice on plaintiff's land, and is now engaged in cutting and removing ice therefrom, and that unless defendant is restrained, its acts will make necessary a multiplicity of suits, and that the enforcement of plaintiff's rights at law or by criminal prosecutions would produce breaches of the peace and other improper conditions, states facts showing that plaintiff has no adequate remedy at law, and is sufficient to entitle him to injunctive relief. p. 291.
2. **INJUNCTION.**—*Right to Relief.*—*Continuous Trespass.*—*Inadequacy of Legal Remedy.*—Injunctive relief may be granted, even though plaintiff may have a legal remedy, if the trespass is continuous in its nature, or consists of constantly recurring acts, which would render resort to the legal remedy impractical because of a multiplicity of suits and the consequent smallness of the damages that could be recovered in each case when compared with the expense entailed. p. 291.
3. **COURTS.**—*Rules.*—*Validity.*—Courts have the inherent power to make rules for the proper conduct of their business, and which do not conflict with the statutes, and such rules, when made, are obligatory both upon court and litigants. p. 292.

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4. **VENUE.—*Change of Venue.—Time of Application.***—Where the rules of the trial court provided that a motion for change of venue must be filed three days before the date of trial, except when it appears by affidavit that the reasons for the change were not known before that time, a defendant, though not served with summons, was not entitled to a change of venue in the absence of a showing why the application was not filed within the prescribed time, where the record disclosed defendant's prior appearance by counsel and a continuance of the cause by agreement of the parties. p. 292.
5. **TRESPASS.—*Trespass to Real Estate.—Elements of Recovery.—Title.***—Plaintiff need not prove title to real estate in order to recover for trespass, proof of possession being sufficient. p. 294.
6. **NAMES.—*Idem Sonans.—Names Within Rule.***—Courts look to the sound of names rather than to their spelling, and the names "Valentine Schuetz" and "Falladine Schutz" are *idem sonans*, so that it will be presumed that "Valentine Schuetz", whose land was divided in a partition proceeding, was "Falladine Schutz" to whom the land had been deeded. p. 295.
7. **BOUNDARIES.—*Land Bordering on Lake.—Conveyance by Plat.***—Where land bordering on a lake has actually been surveyed, platted and conveyed as a "lot" containing a number of acres of land, the grantee takes the land under the water far enough from shore to make out the full subdivision in which the land is situated. pp. 295, 300.
8. **PARTITION.—*Conveyances.—Title Acquired.***—Where the lands of a decedent were partly covered by the waters of a lake, and the commissioners appointed to partition the same among those to whom it had been devised, divided the land by a road into a large tract not fronting on the water's edge, and into a small tract adjoining the lake, and gave to each devisee a share in the large tract and also a strip having water on a part thereof, and in their report described the lands so set apart as "tracts" instead of by metes and bounds it will be presumed that such commissioners partitioned all of the land of the owner, so that the devisees, in receiving land described as "tracts between the road and the lake", thereby acquired the land under the waters of the lake. pp. 296, 297.
9. **BOUNDARIES.—*Land Bordering on Lake.—Conveyance by Metes and Bounds.***—If a description is by metes and bounds, and indicates the shore of a lake as one of the boundary lines, the deed conveys no rights to the land covered by the waters of the lake. p. 297.

From Lake Circuit Court; W. C. McMahan, Judge.

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Action by William Surprise against the Knickerbocker Ice Company and others. From a judgment for plaintiff, the defendant company appeals. *Affirmed.*

Doran & Conboy, Elias D. Salsbury and Benjamin O'Hara, for appellant.

Otto J. Bruce and August A. Bremer, for appellee.

IBACH, P. J.—This was a suit to perpetually enjoin appellant, R. H. Adams, and Charles Nieman from entering upon appellee's real estate and from cutting ice thereon, and for damages for cutting and removing ice therefrom. The case was dismissed as to Adams and Nieman before the filing of any pleadings by defendants. Upon trial had before the court without jury, judgment was rendered for \$10 damages and costs, and an injunction was granted according to the prayer of the complaint. Three grounds of error are argued, (1) that the complaint is insufficient, (2) that the court erred in overruling appellant's motion for a change of venue, and, (3) that the evidence does not show that appellee had title to the real estate where the ice was cut.

The complaint first alleges that the plaintiff is the owner in fee of certain described real estate in Lake County, Indiana. The other averments of the complaint follow: "That parts and portions of the said described real estate is covered by shallow water upon which ice forms and from which ice can be cut and removed during such weather as keeps the water frozen and congealed. That the defendant Knickerbocker Ice Company is now engaged in cutting and removing ice from the said water upon the real estate of the plaintiff. That during the year 1902, the said defendant, Knickerbocker Ice Company, cut and removed ten thousand tons of ice from the water on the said described real estate of the plaintiff, which ice then and there was reasonably worth the said sum of twenty-five cents per ton; that

the said defendant company is now cutting and removing ice from the water on the said described real estate of this plaintiff, and during the month of February, 1907, the said company did cut and remove ten thousand tons of ice from the water on the said described real estate of this plaintiff. That the said defendant R. H. Adams is the superintendent of the said defendant and is now engaged in directing the men in the employment of the said company; and the defendant Charles Nieman is the field foreman who under the said superintendent is in the immediate charge of the men engaged in removing the said ice. That the said defendants are now cutting and removing ice from the water of the plaintiff's said real estate, and are now engaged in working upon, across and over the plaintiff's said real estate bringing ice from other tracts of real estate to and upon the plaintiff's said real estate, and removing such ice so brought from other tracts of real estate across and over the plaintiff's said real estate. And the defendants are now threatening to and will continue to cross and recross the plaintiff's said real estate and move ice across and over the plaintiff's said real estate unless restrained and enjoined from so doing. That the defendants from time to time in years past have cut and removed ice from the water upon the plaintiff's said real estate, and have cut and removed across and over the plaintiff's said real estate ice brought from elsewhere, and the defendants are now engaged in cutting and removing from the water on the plaintiff's said real estate and in removing other ice brought from elsewhere upon, across and over the plaintiff's said real estate and are now threatening to and will continue to do the acts and things aforesaid unless enjoined and restrained from so doing. That each and all the acts of the said defendants are without right, permission or authority of this plaintiff. That unless the defendants are restrained and enjoined from the doing of each and all of the several

acts aforesaid a multiplicity of actions and suits will be necessary from time to time, causing a large and unusual expense of money, time and annoyance. That the said defendants employ large numbers of persons, several hundred persons in the doing of the said acts, and that it is impossible to cause the arrest of each and all thereof from time to time as the various entries are made and threatened to be made upon the plaintiff's property. That the enforcement or attempted enforcement of the plaintiff's rights at law or in a criminal court would cause breaches of the peace, affrays, riots and other improper conditions. That the plaintiff has already been damaged in the sum of \$1000, and has heretofore resulted in former lawsuits for like damages and a multiplicity of suits will be necessary in the future unless the defendants and each of them are restrained and enjoined from the doing of the several acts which the said defendants are doing and threatening to do. That the plaintiff has no adequate remedy at law and will sustain irreparable damage and loss unless the said defendants are enjoined from the doing of the acts now being done and those threatened. Wherefore the said plaintiff asks judgment for the sum of one thousand dollars, and that the defendants and each and all of them be forever and perpetually enjoined from entering upon the plaintiff's said real estate or any part or portion thereof, and from cutting and removing any ice from any part or portion of the water on said real estate and that they be enjoined from bringing and removing ice from elsewhere upon, across and over the plaintiff's said real estate and that the defendants and each of them be forever enjoined from the doing of each and all of the said acts either individually or by and through the means of agents and servants and for any and all other proper relief."

We are first called upon to determine the sufficiency of the complaint. It is not always an easy matter to distinguish

between what constitutes a mere naked trespass for

1. which there is a full and adequate remedy at law and what constitutes such a degree of irreparable injury as will authorize the court to interfere and
2. grant injunctive relief. We consider the complaint before us free from doubt. In the case of *Lembeck v. Nye* (1890), 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. 828, a suit to enjoin the defendants from doing certain acts upon the land covered by water belonging to the plaintiff, the court said: "The agreed statement of facts shows that the defendant Nye is insolvent, and the financial condition of Andrews doubtful; but aside from this, and were they both solvent and fully able to respond to any damages that might be recovered against them in actions of trespass, yet, it is apparent from the whole record that such actions would not afford an adequate remedy for the violations of the rights of the plaintiff in error in the past; and those threatened in the future were, and are, during certain seasons of the year of daily, if not of hourly, occurrence under the claim of a right to do so; besides the injury resulting from each separate act would be trifling, and the damages recoverable therefore scarcely equal to a tithe of the expense necessary to prosecute separate actions therefor." It has also been announced many times and by different courts and law writers that "though property owners have a remedy at law for the intrusion upon their rights, yet as the trespass is continuous in its nature, they can have an injunction to prevent a multiplicity of suits, and can recover the damages they have sustained as incidental to the equitable relief."

1 Joyce, Injunctions §10. See, also, 1 High, Injunctions §697; 1 Pomeroy, Eq. Jurisp. (2d ed.) §243; *Tantlinger v. Sullivan* (1890), 80 Iowa 218, 45 N. W. 765. 1 High, Injunctions at §702 says: "• • • when the wrongful acts continued or threatened to be continued may become

the foundation of adverse rights and may occasion a multiplicity of suits to recover damages, the case presents such equitable features as to entitle complainant to the aid of an injunction.” This doctrine is well supported by *Shaffer v. Stull* (1891), 32 Neb. 94, 48 N. W. 882; and *Poirier v. Fetter* (1878), 20 Kan. 47. The courts have also decided that where the acts of trespass are constantly recurring, but the injury resulting from each separate act is trifling, so that the damages recoverable for each act would be very small when compared with the expense necessary to prosecute separate actions at law therefor, relief will be granted owing to the inadequacy of the legal remedy. See, also, *Lembeck v. Nye, supra*. Even if an injunction were not asked, the complaint sufficiently states a cause of action as alleging a trespass against appellee on the part of appellant, and asking damages therefor, and will withstand demurrer for that reason. The trespass alleged is a continuing one, which would on the facts stated furnish grounds for many causes of action, and we know of no adequate remedy at law open to appellee. He is not obliged to confine himself to his remedy at law and bring a new action every time this continuing trespass is repeated. The complaint states facts sufficient to obtain the relief asked. *Wirrick v. Boyles* (1910), 45 Ind. App. 698, 91 N. E. 621; *Brenner v. Heiler* (1910), 46 Ind. App. 335, 91 N. E. 744; *Owens v. Lewis* (1874), 46 Ind. 488, 15 Am. Rep. 295; *Miller v. Burket* (1892), 132 Ind. 469, 32 N. E. 309; *Bonnell v. Allen* (1876), 53 Ind. 130; *Pence v. Garrison* (1884), 93 Ind. 345; *Field v. Holzman* (1884), 93 Ind. 205; *Tamtlinger v. Sullivan, supra*; *Lembeck v. Nye, supra*.

- By a rule of the Lake Circuit Court, motions for
3. change of venue “must be filed at least three days before the day the case is first set for trial,” except
 4. when the reasons for the change are not known within the time specified, and in such case this must be

shown by affidavit. The court found that appellant's motion for change of venue was not made three days before the cause was first set for trial, no reasons were given or attempted to be given why the motion was not filed at the specified time, and the court overruled the motion for non-conformity to the rule of the court. Courts have the power inherently to make rules not in conflict with the statutes of the State for the proper conduct of their business, and it is not only their right but their duty to enforce them, and they are obligatory upon the court, and upon the parties to causes pending before it. *Smith v. State, ex rel.* (1894), 137 Ind. 198, 36 N. E. 708; *Magnuson v. Billings* (1899), 152 Ind. 177, 52 N. E. 803; *Rooker v. Bruce* (1908), 171 Ind. 86, 85 N. E. 351; Elliott, App. Proc. §7. The record in the present case sets out the summons and the sheriff's return thereto, which show no service upon the Knickerbocker Ice Company, and appellant contends that its first appearance before the court, as shown by the record, was when the motion for change of venue was filed. The case of *Truitt v. Truitt* (1871), 38 Ind. 16, is cited to the effect that a rule of court should not operate on a party who has entered his appearance after the day the cause is docketed for trial, and had not previously subjected himself to the jurisdiction of the court, as the rules of court can operate only on parties who are in court. This holding is not applicable to the facts before us, for the record shows that some fourteen months before the change of venue was asked, the parties appeared by counsel, and a continuance was granted by agreement, and that the costs occasioned by such continuance were assessed to the defendant Knickerbocker Ice Company. This entry in the record shows that appellant had appeared to ask a continuance before its appearance to file a motion for change of venue, and that it was subject to the jurisdiction of the court, and therefore to the rules of the court.

The point most strongly argued by appellant is that the

evidence does not show title in appellee to the land where the trespass was committed. We may prefix discussion of this question by saying that it is not necessary to prove title in order to recover against a trespasser, but only to prove possession. Appellant admits the trespass. Its witnesses, among them its officers, speak of the realty where the trespass was committed as appellee's property. The question of title seems not to have been raised until appeal. The real estate, from entering upon which appellant was enjoined, consists of two tracts, the larger of which is situated on the east side of Cedar Lake, in Lake County, Indiana, and contains eighty acres, some fifty acres of which is dry land, and the remaining portion of which is covered with the waters of Cedar Lake. Adjoining this is a strip some 2500 feet in length and 140 feet in width, which extends from the aforesaid tract on the east side to the railroad track west of the lake, all of this strip except about an acre and a half on the west shore being covered with the waters of the lake. Appellant at the time of the trespass had leased the portion of the lake south of this strip and north of it for the purpose of cutting ice. In order to bring ice from the north field to its ice house at the south end of the lake, appellant cut a channel some twenty feet wide through this 140-foot strip of ice in appellee's possession, and rafted ice through this channel. The only ice carried away was the ice taken from the channel. Appellant does not question appellee's title to the larger tract of real estate on the east side of the lake, but only to the 140-foot strip. To prove title to this, there was introduced in evidence a warranty deed from Barbara Weis and Daniel Weis her husband to appellee, the record of the court in the partition proceedings of the heirs of Valentine Schuetz, in which this strip of land was set off to Barbara Weis, and a warranty deed from George Emerling and Catherine Emerling his wife, Clemens Emerling and Magda-

lena Emerling his wife, to Falladine Schutz, which conveyed to him the entire land embraced in the partition proceeding, and other land adjoining, which had been sold off by Valentine Schuetz before his death. It is argued

6. that it is not shown that Falladine Schutz ever parted with the title in the said real estate. However, courts look to the sound of names rather than to their spelling, the names Valentine Schuetz and Falladine Schutz are *idem sonans*, and the court will presume that the Valentine Schuetz whose land was divided in the partition proceedings was the same Falladine Schutz to whom the land was deeded by the Emerlings. *Lilly v. Somerville* (1895), 142 Ind. 298, 40 N. E. 1088; 29 Cyc. 273. It is apparent that the name Valentine Schuetz is of German derivation and a scrivener attempting to represent in English spelling the name Valentine from hearing its German pronunciation, might easily write it Falladine. Furthermore, in the partition proceedings the court found that certain named persons, among them Barbara Weis, were the owners as tenants in common of the real estate in question as devisees of Valentine Schuetz.

The deed from the Emerlings to Schutz conveyed lots one and two and the west half of the northwest quarter of section 34 in township 34 north of range nine west,

7. containing 199 acres more or less, on July 21, 1864.

It is the rule that where the land bordering on a lake has actually been surveyed, platted, sold and conveyed as a "lot" containing a number of acres of land, the grant takes the land under the water far enough from shore to make out the full subdivision in which the land is situated. In this case the land was surveyed and is described as lots one and two of section 34, therefore the deed conveyed the land underneath the waters of the lake to the section line of section 34. The land owned by appellee to the east side of the lake in section 35 extended to the sec-

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tion line, and there adjoined the tract which was deeded to Schutz by the Emerlings. *Tolleston Club, etc., v. State* (1895), 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Kean v. Roby* (1896), 145 Ind. 221, 42 N. E. 1011; *Mason v. Calumet Canal, etc., Co.* (1898), 150 Ind. 699; *Tolleston Club, etc., v. Clough* (1896), 146 Ind. 93, 43 N. E. 647.

The next question is whether the order of the commissioners in the partition proceeding is sufficient to convey the riparian rights of Valentine Schuetz to Barbara

8. Weis. In the deed from her and her husband to appellee the land conveyed is described as “a part of the northeast quarter of section 34, township 34 north, range nine west 2nd P. M., it being that part of said quarter section lying east of the road as laid out by the commissioners of the Lake Circuit Court at its September term, 1895, in the partition of the Valentine Schuetz estate, which was set off to Barbara Weis in the said partition, as shown and designated on the plat included in the report of said commissioners. The grantors also convey hereby all riparian rights, ice and water privileges belonging to them adjacent to said land.” Before the death of Valentine Schuetz he had sold off portions of the land conveyed by the Emerlings to him, next to the shore of the lake. The commissioners who partitioned the remaining lands first divided them by a road into a large tract not fronting on the water’s edge and a small tract adjoining the lake. Each devisee was given a share in the large tract, and then each was given a small strip having water on a part thereof, it seemingly being the intention to thus make each one a riparian owner, and give to each one ice and water privileges, which they could not have had if the tract had been divided otherwise. The report of the commissioners does not describe the lands set apart by metes and bounds, but simply as “tracts.” After describing the tracts set aside in the larger division, the report reads, “We further set apart to” (cer-

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tain devisees, certain tracts) “ Barbara Weis the tract next adjoining on the south 140 feet wide; to * * * all said latter tracts being between the road aforesaid and Cedar Lake; and for further description we herewith file a plat of the tracts of land so partitioned by us as a part of this report.”

Appellant cites *Brophy v. Richeson* (1894), 137 Ind. 114, 36 N. E. 424, to support its contention that this order does not convey riparian rights. It is true that if a de-

9. scription in a deed is made by metes and bounds, and indicates the shore of a lake as one of the boundary lines, such deed conveys no rights to the land covered by the waters of the lake. But in the report of the partition commissioners, the tracts set off are not described by

8. metes and bounds. These commissioners were appointed to partition the entire real estate devised by Valentine Schuetz in section 34, which extended, as we have seen, to the east line of section 34, and the presumption is that they performed their duty, and partitioned all of it, and did not leave the devisees as tenants in common of a part of the property which they were appointed to partition. The purpose of their dividing the land east of the road by them established into small tracts seems to have been to give to each devisee a share in the ice and water privileges held by their testator. The words of description used in the report are simply a convenient method of identifying the lands set aside, not a limitation, and in the absence of a clear expression limiting the tract set off to the land not covered by the lake, and clearly making the lake shore a boundary, the report of the commissioners will be held to have transferred the whole of the interest of Valentine Schuetz, and the devisees who received lots described as “tracts between the road and the lake,” will be held to take the lands covered by the waters of the lake between the shore and the section line to which their testator’s land

extended. Therefore Barbara Weis became the owner of a strip of land 140 feet wide, extending from the road laid out by the commissioners to the east section line of section 34, and her rights in this strip she fully conveyed to appellee by deed.

We hold that the evidence discloses a complete and unbroken chain of title extending from the Emerlings to appellee in the land where the trespass was committed, does not show that any other person has any claim of title to such land, and shows that appellee was in actual possession of the real estate under claim of title, which in itself is sufficient against a trespasser.

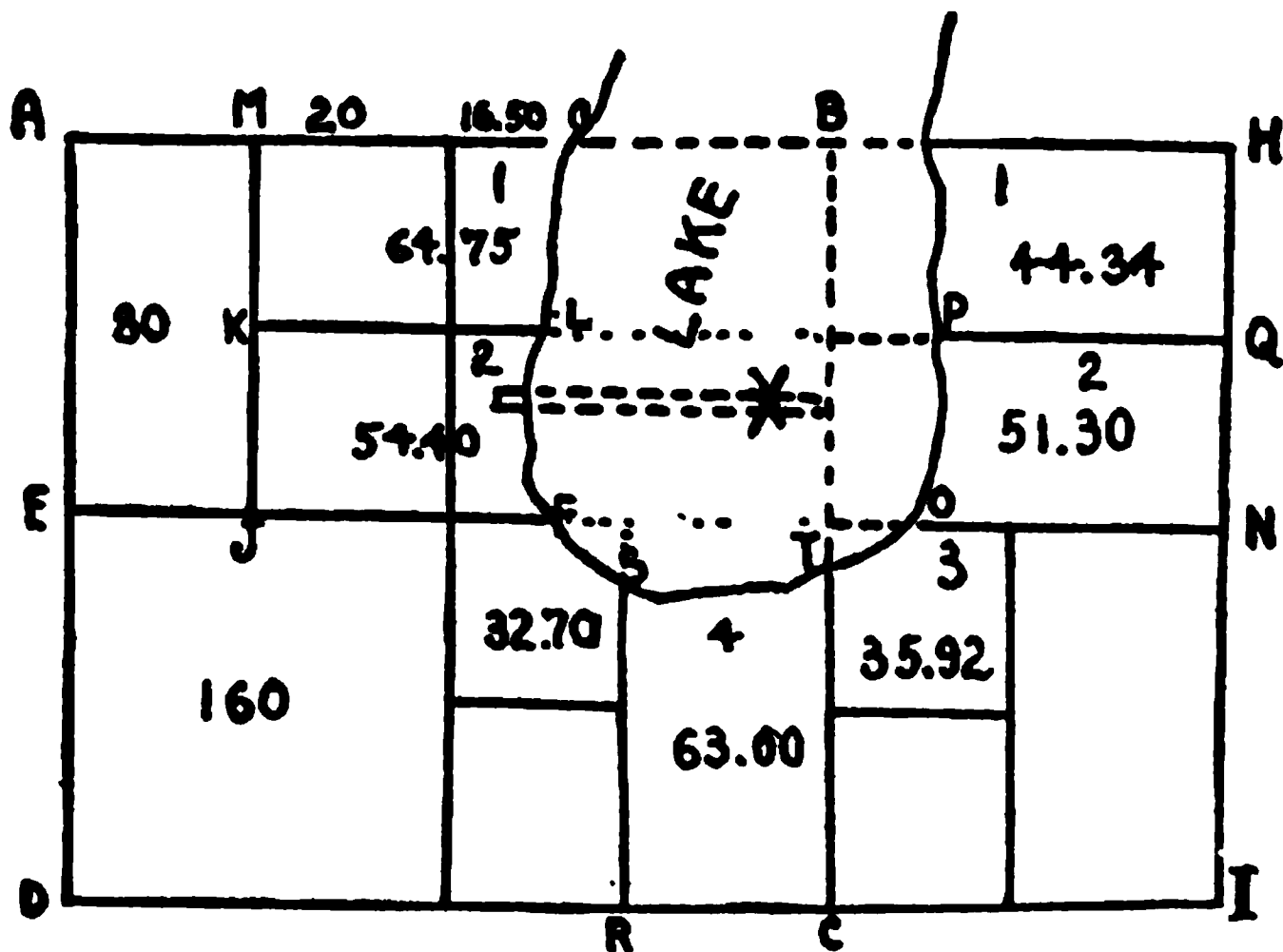
The judgment is affirmed.

ON PETITION FOR REHEARING.

IBACH, J.—Appellant urges that the court erred in holding that lot 2 of section 34 extended to the section line, and bases its contention upon the opinion in the case of *Stoner v. Rice* (1889), 121 Ind. 51, 22 N. E. 916. In that case the court said, “The true doctrine to apply in the disposition of such land as is covered by the body of such lakes, we think, is that the government in making surveys included in such surveys *all* (our italics) the land within the district surveyed, and if there was a lake or large pond which covered a part of a subdivision it was meandered out, and the dry land in such subdivision designated as a fractional subdivision, or lot; that in the purchase of such fractional subdivision, or lot, the purchaser took title to it as a riparian owner, with the right to the land as the water receded within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision, though it was described as a fractional subdivision, or lot. The authorized survey divided all the land within the district into subdivisions.”

In order to better present the questions involved in the

discussion of the point raised by the petition for rehearing, we annex the following diagram, which fairly sets out the situation.



X Approximate spot where trespass occurred.

A, B, C and D, corners of Sec. 34; B, H, I and C, corners of W $\frac{1}{2}$ Sec. 35; A, G, F and E, corners of Schutz lands partitioned; M, G, L and K is lot 1, Sec. 34; L, F, J and K is lot 2, Sec. 34; C, R, S and T is lot 4, Sec. 34; N, O, P and Q is lot 2, Sec. 35.

As appellant points out to the court, if it were held that all the lots extended to the section line, the east half of the northeast quarter of section 34 would belong both to the owners of lots 1 and 2, and to the owner of lot 4. Manifestly such a result would be incorrect. On the other hand, if we apply the rule insisted upon by appellant, that the lots extend under the water only to the nearest subdivision line, that is, in the case of lots 1 and 2, the quarter-quarter section line, then the east half of the northeast quarter of section 34 would not have been included in any portion of the survey. To reach this result would be as much an error as the former. There must be some rule which will allow us to escape this dilemma of adjudging that these lands

were twice included in the survey, or were not included at all.

By the government system of land surveys, sections may be subdivided into subdivisions of various classes, namely—half sections, quarter sections, half-quarter sections, 7. and quarter-quarter sections. 2 U. S. Comp. Statutes, §§2395-2397. Where the lands bordered on a lake, fractional subdivisions were laid out and called lots, the number of acres contained therein being designated by the number of acres of dry land. It is held by the case of *Stoner v. Rice, supra*, and by the cases cited in the opinion, that where all the land in the district was surveyed the holders of the fractional subdivisions or lots took under the water to make out the full subdivision in which the dry land was situated. The question then becomes, If all the land was surveyed, in which lot was the land under water in the east half of the northeast quarter of section 34 included? Lot 4 is manifestly laid out as a fractional half-quarter section, in the east half of the southeast quarter of section 34. It would clearly be wrong to extend it into another quarter section by holding that the lands in the east half of the northeast quarter were attached to it. Lots 1 and 3 are laid out in the north half of section 34. Lot 2 includes the southeast quarter of the northwest quarter, and the dry land portion of the south half of the northeast quarter. We think it would be error to hold that this lot does not include the entire south half of the northeast fourth. The lands in the east half of the northeast quarter must have been, under the very holding upon which appellant relies, included in the survey, and we cannot with propriety hold that the lands in the southeast fourth of the northeast fourth could be included in any other than lot 2. It follows that the court did not err in the holding in the original opinion that lot 2 extended to the section line.

Petition for rehearing overruled.

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NOTE.—Reported in 97 N. E. 357; 99 N. E. 58. See, also, under (1) 22 Cyc. 928; (2) 22 Cyc. 836; (3) 11 Cyc. 740, 742; (4) 40 Cyc. 147, 150; (5) 38 Cyc. 1017; (6) 29 Cyc. 272; (7) 5 Cyc. 893; (8) 30 Cyc. 320; (9) 5 Cyc. 894. As to the authority of courts to enact rules, see 41 Am. St. 639. As to *idem sonans* and presumptions as to the identity of names, see 100 Am. St. 323. As to waters as boundary lines, see 27 Am. St. 56. On the question of the title to land under lakes, see 42 L. R. A. 175. And for boundary on lake, see 51 L. R. A. 178.

SNYDER v. FRANK ET AL.

[No. 7,828. Filed April 23, 1913.]

1. GIFTS.—*Gifts Inter Vivos.—Delivery.—Actions.*—Where a decedent executed deeds to his real estate and assigned notes, certificates of deposit and stock certificates, and placed them in separate envelopes addressed to his several children, and delivered the envelopes to another to be delivered to the children after his death, the children took by gift *inter vivos*, so that in an action on one of the notes, the plaintiff sued as his father's donee *inter vivos*, and not as a devisee or heir in his estate. p. 305.
2. WITNESSES.—*Competency.—Nature of Action.—Action by Heirs.*—Under §522 Burns 1908, §499 R. S. 1881, providing that in suits by or against heirs, founded on a contract with the ancestor, to obtain title to or possession of property in the right of such ancestor, or to affect the same, neither party shall be a competent witness as to matters occurring before the ancestor's death, the defendant, in an action on a note received by plaintiff from his ancestor by gift *inter vivos*, was not disqualified to testify as to facts and circumstances connected with the execution and delivery of the note to the ancestor, since the action was not by or against heirs, and was not to obtain title to or possession of property in the right of the ancestor, or to affect the same in any manner. p. 306.
3. EVIDENCE.—*Res Gestae.—Declarations of Agent.*—The declarations of an agent while actually transacting the business which his principal authorized him to transact are admissible as a part of the *res gestae*. p. 309.

From Pike Circuit Court; *John L. Bretz*, Judge.

Action by Harley R. Snyder against Sol Frank and another. From a judgment for plaintiff, the plaintiff appeals. *Reversed.*

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J. W. Brumfield, J. W. Wilson and Pickens, Moores, Davidson & Pickens, for appellant.

John K. Chappell, for appellee.

HOTTEL, J.—This was a suit by appellant on a \$1,000 promissory note executed by appellees, August 1, 1908, and due August 1, 1909. The complaint was in one paragraph. Appellee Levi filed an answer of suretyship. Appellee Sol Frank filed a set-off in which he sought to recover on a \$520 note of date April 28, 1900, executed by appellant Snyder to Gus Frank and endorsed "G. Frank." To this set-off appellant replied in three paragraphs, the first paragraph being a general denial, the second a plea of payment, and the third a plea of accord and satisfaction by the sale and delivery to Gus Frank of 52 shares of stock of \$100 each in the Alaska Gold Mining Company of Indiana, which stock was alleged to have been bought by the said Frank through said Snyder on April 28, 1900, at and for the price of \$520 and assigned to said Frank on the books of said corporation on April 30, 1900. There was a trial by the court and a finding for the appellant Snyder on the note sued on by him in the sum of \$1,254.95, principal, interest and attorneys' fees and a finding for the appellee Sol Frank on his set-off in the sum of \$1,030.40, principal, interest and attorney's fees on which finding the court rendered judgment for Snyder in the sum of \$224.55, being the excess of the sum found due on the note sued on in the complaint over that found due on the note filed with the set-off.

The appellant filed a motion for new trial which was overruled and exceptions saved. The ruling on this motion is the only error assigned. Eight grounds for a new trial are stated in the motion, but it is, in effect, conceded by the parties that the questions presented by the appeal all turn upon the disposition to be made of the sixth and seventh grounds of said motion. These grounds relate to the ad-

mission of evidence. During the progress of the trial the appellant offered Simeon J. Haines as a witness, and subject to appellees' objections, he was permitted to testify in substance that on April 28, 1900, Harley Snyder came to him to buy that stock for Gus Frank, referring to the mining stock for which the note mentioned in the set-off was alleged to have been given, and that at the time he made the transfer of such stock to Frank and while Snyder was paying him the money therefor, Snyder said to him, the witness: "Now I had to give my note for this money and I want to have the stock sent back to me and I will deliver it to Mr. Frank and pay my note. That is how I come to assign the stock to him. I had got my money and assigned the stock over and instructed the secretary to return the stock to Mr. Snyder." This witness on cross-examination testified as follows: "Q. Now, when was that Mr. Snyder, told you that he was the agent of Mr. Frank, to buy some stock that you owned? A. Well, I think it was on Friday before that he told me that Mr. Frank told him that he wanted some stock and wanted to know if I would sell some of my stock. I told him I would. Q. All you know about that is what Snyder told you himself? A. That is all."

The appellant offered himself as a witness, and, subject to appellees' objections, testified to a conversation between himself and Gus Frank, in reference to the purchase of stock in the Alaskan Gold Mining Company, substantially as follows: "Mr. Frank, remarked to me that he had five shares of stock in the Juallem Mine and he would not mind to have a block of stock in the mine I was associated with, provided he could get it cheap enough, and asked me to see what I could secure a block of it for him for. The next day I told him I could secure a block of stock from Mr. Haines, for him, for \$10 a share. He said he would take it. This was on the 28th day of April, 1900. I saw Mr. Frank in the bank, an hour or two after this talk, and I told him that Mr. Haines wanted to dispose of 52 shares of his

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stock. Mr. Frank then gave me the cash, \$520.00 to pay for it. At the time he gave me this money, I requested him to write a receipt saying that I would sign it until I closed the deal for him. He took up this temporary note off the table and filled it out and said, 'sign this'. The body of this note is in the handwriting of Gus Frank. This note was given by me to him for the \$520 I got of him and paid to Mr. Haines for the 52 shares of stock. I paid the same money I got from Mr. Frank to Mr. Haines the day I got it from Mr. Frank, and after that delivered the stock to Mr. Frank." After being requested to look at a book the witness testified that he delivered to Mr. Frank certificate No. 608 for 20 shares; that he delivered certificates 608, 609 and 610 on the 2d day of May, 1900; that at the time he delivered the stock he called for his note. "Mr. Frank made search for the note through his safety box there in the bank and failed to find it and remarked that if he could find it he would hand it to me and if not he would give me a receipt against it. Two weeks later I went away. The stock was issued to Mr. Frank by the corporation Monday, the 30th. I delivered it to him May 2nd. I got the re-issue of stock I gave to Mr. Frank from Mr. Moore through the P. O. Mr. Frank never mentioned the note to me afterwards." A cross-examination of the witness developed the same facts more in detail.

The court after hearing this evidence of each of said witnesses, finally sustained the objection in each case and excluded it, to each of which rulings the appellant excepted, and assigned the same as his sixth and seventh grounds respectively for a new trial, and is now insisting that such evidence was improperly excluded.

Gus Frank, the original payee of the \$520 note involved in the set-off died December 16, 1909. It is claimed by Sol Frank (hereafter referred to as appellee) that by §522 Burns 1908, §499 R. S. 1881, the appellant was incompetent to testify to any matter occurring prior to the death of Gus Frank,

and that for this reason the evidence of appellant Snyder was properly excluded, and that, with his evidence out, there was no evidence showing that he was the agent of Gus Frank in buying the stock for which the \$520 note was claimed to have been given; that any statements which he may have made to the witness Haines were not competent for such purpose for the reason that the declarations of an agent are not competent evidence to establish the fact of the agency. It is apparent therefore, that the correctness of each ruling depends on whether or not, by §522 Burns 1908, §499 R. S. 1881, appellant is rendered incompetent to testify to any matter that occurred prior to the death of Gus Frank. This section is as follows: "In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor."

It is conceded in appellees' brief that Gus Frank before his death, viz., on June 16, 1909, made disposition of his property, real and personal, among his four children.

1. He executed deeds to his real estate and assigned notes, certificates of deposit, certificates of stock in various banks, and other corporations and placed these in separate envelopes addressed to each of his children, and "delivered the four envelopes to Leslie Lamb, cashier of the First National Bank of Petersburg, Indiana, to be delivered to his children after his death." These envelopes were delivered by Mr. Lamb after the death of Gus Frank and in the envelope delivered to appellee was found the \$520 note involved herein, endorsed as above set out. Some mention is made in appellee's brief of a will being made by Gus Frank on the same day in which a like disposition of his property was made. The evidence, however, dis-

closes that appellee claims the \$520 note in suit by reason of his father having endorsed it and placed it in the envelope addressed to him and delivered to said Lamb as above set out. In fact it was conceded in the oral argument that the will mentioned was not introduced in evidence and that the appellee's claim to the \$520 note is based on the division of the father's property among the heirs made by him in his lifetime as above indicated. Under this claim of appellee and the evidence given in its support, the note in suit was a gift *inter vivos* by the father to the son. *Martin v. McCullough* (1894), 136 Ind. 331, 338, 34 N. E. 219; *Wyble v. McPheters* (1876), 52 Ind. 393; *Jacobs v. Jolley* (1902), 29 Ind. App. 25, 33, 62 N. E. 1028; *Crawfordsville Trust Co. v. Ramsey* (1912), 178 Ind. 258, 100 N. E. 1049. It follows, we think, under these holdings, that appellee sued herein as his father's donee *inter vivos*, and not as a devisee or heir in his estate.

In the case of *Creamer v. Sirp* (1883), 91 Ind. 366, the section of statute here involved was under consideration and the Supreme Court there said (p. 368): "While

2. this is a claim growing out of a contract with the ancestor, it is not claimed as heir or devisee, but by grant in the contract, and it does not in any manner affect the ancestor's estate, or any property, real or personal, formerly owned by him. The property had all passed into the hands of the defendant in the lifetime of the ancestor, and no claim whatever is set up in relation to any part of said property." In the case of *Peacock v. Albin* (1872), 39 Ind. 25, the Supreme Court, in discussing the same section of statute at page 29 said: "We are clearly of the opinion that the word heirs as used in the above proviso was intended to include all persons, whether they took the estate *under the law or by virtue of a will*, in all cases where the *devisee or legatee* would have taken any portion of the estate under the statute of descents. * * * If the purpose was to exclude parties as witnesses in all cases, it

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seems to us that the legislature might have expressed such purpose in a much briefer and far more intelligible manner.” (Our italics.) Henry, Probate Law (2d ed.) §§489, 490 says: §489. “* * * And the word heirs, as used in this statute, is intended to include all persons who take the estate of the decedent *under the law, or by virtue of a will. Under this statute one element which creates the right of action is the fact that the decedent held title to the property involved, at the time of his death.* * * *” §490. “The word ‘heirs’ as used in this statute includes all persons who take any portion of the decedent’s estate by descent, or who would so take, if they did not take by virtue of a will. * * *” (Our italics.) To the same effect see: *Hiatt v. McColley* (1908), 171 Ind. 91, 85 N. E. 772; *Cincinnati, etc., R. Co. v. Cregor* (1898), 150 Ind. 625, 629, 50 N. E. 760; *Michigan Trust Co. v. Probasco* (1902), 29 Ind. App. 109, 63 N. E. 255; *Hankey v. Downey* (1894), 10 Ind. App. 500, 38 N. E. 220; *Waltz v. Waltz* (1882), 84 Ind. 403, 409; *Sullivan v. Sullivan* (1893), 6 Ind. App. 65, 69, 32 N. E. 1132; *Sloan v. Sloan* (1898), 21 Ind. App. 315, 317, 52 N. E. 413; Henry, Probate Law (2d ed.) §§489-491. It appears from the language used in several of the decisions and especially from §490, Henry, Probate Law, and *Waltz v. Waltz, supra*, that appellant is not rendered incompetent by the section of the statute in question, not only because the suit is not by or against heirs or devisees but because the subject-matter of the suit is not within the provisions of the section. In the case of *Waltz v. Waltz, supra*, the Supreme Court at page 409 said: “The act of March 15, 1879, renders such witnesses in such cause incompetent. This is not, however, such a suit. This is not a *suit by heirs, or against heirs*, upon a contract made with an ancestor to obtain title to or possession of property belonging to such ancestor. The persons who bring the suit are heirs, but they do not bring it as heirs, nor do they seek to obtain title to or possession of any property of the ancestor. They

seek to obtain a judgment against their debtor, and to have the same declared a lien, upon land conveyed to him by their ancestor; such land is not the property of the ancestor, nor does the claim for the purchase money belong to his estate. There was, therefore, no error in allowing these witnesses to testify.” (Our italics.) Again this court in the case of *Sullivan v. Sullivan, supra*, at page 69 said: “The witness was not incompetent by reason of section 498, nor was he so under section 499, for that section contemplates only suits between heirs or by or against such, founded on a demand against the ancestor to obtain title to or possession of his property, or to affect it in any manner. This was not such a suit. See Henry, Probate Law 309, *et seq.*, and 2 Works’ Practice §1219, where the questions are discussed and the authorities cited.” Henry in his Probate Law (2d ed.) §491 says: “* * * This section was not intended to apply to actions, the object of which was to recover a judgment for money. It embraces actions to obtain the possession of land; for specific performance of contract with the ancestor in reference to land; to quiet the title to lands, or to remove a cloud from such title; and actions to obtain the possession or try the title to articles of personal property. * * * ” Other decisions indicate the same construction. If this construction be correct, it necessarily follows that appellant’s evidence was improperly excluded both for the reason that this suit was not by or against heirs and for the further reason that it was not a suit to *obtain title to or possession of property*, real or personal, of, or in the right of such ancestor or to affect the same in any manner.

It should be remarked however, in this connection, that there is language used in some of the cases that would at least indicate a different construction of this section, in so far as the subject-matter of the action has to do with the question involved. There is language in some of the cases indicating that if the action be by or against heirs or de-

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visees *either* “founded on a contract with or demand against the ancestor [or] to obtain title to or possession of property”, etc., that neither party shall be competent, etc. It is not necessary for the purposes of this case that we attempt to reconcile the apparent conflict in the language used in these cases, because under any and all of them the appellant was a competent witness, and error resulted from the exclusion of his evidence. We may remark, however, that the language of the statute and its punctuation indicate that the legislature intended the construction placed on it by the cases cited and quoted from, *supra*. The intention of such a construction becomes more manifest when, as suggested by Mr. Henry, the section is read in connection with the preceding §521 Burns 1908, §498 R. S. 1881. See, Henry, Probate Law (2d ed.) §491.

It follows also that the evidence of the witness

3. Haines in so far as it related to what was said and done by Snyder at the time of the transfer and payment for the stock mentioned in the evidence of said witness, was improperly excluded. With the evidence of appellant admitted, his authority to buy and pay for the stock for and as the agent of Gus Frank is shown, and it follows, under the law, that his declarations and statements while actually transacting the business which his principal authorized him to transact were admissible as part of the *res gestae*. *United States Express Co. v. Rawson* (1886), 106 Ind. 215, 218, 6 N. E. 337; 16 Cyc. 1006, 1007, 1008; *Cleveland, etc., R. Co. v. Closser* (1890), 126 Ind. 348, 365, 26 N. E. 159, 22 Am. St. 593, 9 L. R. A. 754; *Willison v. McKain* (1895), 12 Ind. App. 78, 83, 39 N. E. 886; *Fields v. Campbell* (1905), 164 Ind. 389, 396, 72 N. E. 260, 108 Am. St. 301.

For the error in excluding the evidence indicated herein, the judgment is reversed with instructions to the trial court to grant a new trial and for further proceedings consistent with this opinion.

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NOTE.—Reported in 101 N. E. 684. See, also, under (1) 20 Cyc. 1198, 1209; (2) 40 Cyc. 2263, 2304; (3) 16 Cyc. 1003. As to conveyances to take effect after grantor's death, see note to *Wilson v. Carrico* (Ind.), 49 Am. St. 219. As to what is included in the *res gestae*, see 95 Am. Dec. 51; 16 Am. St. 407. As to declarations that form part of the *res gestae*, see 58 Am. Rep. 184.

BIMEL ET AL. v. BOYD.

[No. 7,885. Filed April 23, 1913.]

1. PLEADING.—*Demurrer.—Defect of Parties.*—A demurrer for defect of parties can only reach a defect of parties apparent from the complaint. p. 312.
2. APPEAL.—*Questions Reviewable.—Demurrer.—Defect of Parties.*—No question as to defect of parties is presented by the assignment of errors, where the question was not presented to the trial court by the demurrers filed. p. 313.
3. CONVERSION.—*Complaint.—Necessary Allegations.—Demand.*—Where an actual conversion is alleged, it is not necessary to aver a demand but it is essential that the complaint should contain averments showing that the plaintiff owns such an interest in the property as to give him the right to sue for its conversion, the value of the property, and its conversion by the defendant. p. 313.
4. CONVERSION.—*Complaint.—Sufficiency.—Cotenants.*—A complaint charging that defendants converted certain bonds to their own use, and alleging facts showing that defendants are cotenants in the bonds with plaintiffs, is not insufficient on the ground that it states specific facts inconsistent with the allegation of conversion, since one may convert common property as against a cotenant. pp. 314, 315.
5. CONVERSION.—*Cotenants.*—A conversion of common property may be accomplished by a cotenant in possession, by rendering impossible any further enjoyment of it by his cotenant, by refusing to appropriate it to the uses for which it is designed, by appropriating it to uses for which it was not designed, or by excluding the cotenant from its use. p. 314.
6. CONVERSION.—*Action Against Cotenant.—Demand.*—In an action by one cotenant against another for the conversion of common property, no demand is necessary. p. 315.
7. CONVERSION.—*Complaint.—Sufficiency.*—A complaint alleging generally that defendants converted the property to their own use

was not insufficient on demurrer, although it might properly have been subject to a motion to make more specific as to the particulars of the alleged conversion. p. 316.

From Jay Circuit Court; *Henry C. Fox*, Special Judge.

Action by Jennie May Boyd against Fred Bimel and others. From a judgment for plaintiff, the defendants, except Lewis G. Walling, appeal. *Affirmed*.

Smith & Fleming, John M. Smith and Eichhorn & Vaughn, for appellants.

James Harrington Boyd, John F. LaFollette, and E. E. McGriff, for appellee.

IBACH, C. J.—Appellee brought this action against appellants for damages for the conversion of certain railroad bonds, and recovered judgment for \$2,100. The only errors assigned and argued are the overruling of the joint demurrer of all the defendants, and the separate demurrers of each defendant, to the amended complaint. In substance, it is averred in the complaint, that on December 7, 1903, the Cincinnati, Bluffton, and Chicago Railroad Company executed and delivered to one Lewis Grissell a certain promissory note for the sum of \$3,000, payable at the Citizens Bank at Portland, Indiana, eight months after date with six per cent interest; that to secure the payment of said note when the same should become due, the railroad company at the time of the execution of such note transferred, assigned and delivered to Grissell as collateral security nine first mortgage bonds of said company, each calling for the sum of \$1,000 and of the value of \$1,000 each. That thereafter, and while still the owner of said note, said Grissell died testate. That by the terms of his will the said note and the securities therefor were bequeathed to plaintiff Jennie May Boyd and defendant Lewis G. Walling share and share alike, and plaintiff is the owner of an undivided one-half interest therein. That plaintiff and defendant Walling were by the will named as executors, and duly qualified

as such and settled said estate and were discharged on February 17, 1906. That after the settlement of said estate, the plaintiff suffered said notes and mortgage bonds to remain in the hands of and the possession of her joint and co-owner, defendant Walling. That while in his possession and without the knowledge or consent of the plaintiff, on or about March 30, 1906, said Walling entered into some contract or agreement with his codefendants, the exact nature or character of which is unknown to plaintiff, by which he undertook to release or relinquish to his codefendants his interest in the said bonds held as collateral security for the payment of the note, and at the same time without this plaintiff's knowledge or consent, turned over to his codefendants the possession of said bonds; that by the terms of said bonds and the mortgage securing the same they are transferable and title thereto passed by delivery. "That the defendants have never accounted to this plaintiff for her undivided one-half interest in said note, or the nine first mortgage bonds pledged as collateral security to secure the payment thereof, but retain said bonds and have converted them to their own use by reason of which plaintiff has been damaged in the sum of forty-five hundred dollars. That said note is long past due and wholly unpaid, and that this plaintiff has never parted with her interest therein, and has never parted with her interest in said nine first mortgage bonds pledged as collateral to secure the payment of said note to the defendants or either of them, or to any one else, but is still the owner of an undivided one-half interest in said note and bonds as aforesaid. Wherefore plaintiff demands judgment for \$5,580.00 and for all other and proper relief."

Appellants are all the defendants except Walling, who has not appealed. It is first argued that the complaint is bad because the American Trust and Savings Bank

1. was not made a party defendant. There was a demurrer upon the ground that there was a defect of

parties in that said bank was not made a party defendant. It does not appear from the complaint that the American Trust and Savings Bank is in any way connected with the cause, or holds, owns, or claims any interest in said bonds or any of them. A demurrer for defect of parties can only reach a defect of parties apparent from the complaint, and the aforesaid demurrer was rightfully overruled. *Western Union Tel. Co. v. State, ex rel.* (1905), 165 Ind. 492, 76 N.

E. 100, and cases cited. It is also urged that it ap-

2. pears from the complaint that the Cincinnati, Bluffton and Chicago Railroad Company has an interest in the bonds, and if so, all the parties were not before the court, and a demurrer would lie for defect of parties. It is sufficient to say in answer to this contention that no demurrer for defect of parties was filed on the ground that the railroad company was not made a party. Consequently such a question was not presented to the trial court by the demurrers filed, and is not presented by any errors assigned here. *State, ex rel. v. McClelland* (1894), 138 Ind. 395, 37 N. E. 799; *Aetna Life Ins. Co. v. Sellers* (1900), 154 Ind. 370, 56 N. E. 97, 77 Am. St. 481.

The remaining argument against the sufficiency of the complaint, and the one most strongly pressed, is that it does not show an unlawful conversion, or a demand and refusal to deliver up the property alleged to have been converted, and that it states no facts showing appellants guilty of a conversion. The material averments which must be

3. found in a complaint for conversion are: (1) the owning of such an interest in the property by the plaintiff as to give him the right to sue for its conversion; (2) the value of the property; and (3) the conversion of the property by the defendant. *Recht v. Glickstein* (1904), 162 Ind. 32, 69 N. E. 667; *Ryan v. Hurley* (1889), 119 Ind. 115, 21 N. E. 463; *Crystal Ice, etc., Co. v. Marion Gas Co.* (1905), 35 Ind. App. 295, 74 N. E. 15. The rule is that when an actual conversion is alleged, it is unnecessary

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to aver a demand. As a matter of pleading, it is sufficient to aver a conversion. *Reish v. Reynolds* (1879), 68 Ind. 561; *Nelson v. Corwin* (1877), 59 Ind. 489; *Bunger v. Roddy* (1880), 70 Ind. 26; *Rauh v. Stevens* (1899), 21 Ind. App. 650, 52 N. E. 997; *Proctor v. Cole* (1879), 66 Ind. 576; *Sloan v. Lick Creek, etc., Road Co.* (1893), 6 Ind. App. 584, 33 N. E. 997; *Koehring v. Aultman, Miller & Co.* (1893), 7 Ind. App. 475, 34 N. E. 30; *Knowlton v. School City of Logansport* (1881), 75 Ind. 103; 21 Ency. Pl. and Pr. 1084.

Appellants concede that under the authorities, the general allegation that the defendants converted the bonds to their own use would be sufficient, unless the specific

4. facts pleaded are in conflict with this general allegation, but they contend that the specific facts are inconsistent with the allegation of conversion. They urge that when defendant Walling conveyed his one-half interest in the bonds to the other defendants they thereupon, succeeding to his rights, became cotenants in the bonds with plaintiff, and therefore as much entitled to their possession as she. However, even if we grant this contention, and even if we admit that except for the averment "they converted the bonds to their own use," the complaint does not contain facts which show appellants guilty of a conversion, yet it does not state specific facts inconsistent with a conversion. One cotenant may convert the common property as against his cotenant. 28 Am. and Eng. Ency. Law (2d ed.) 712; 17 Am. and Eng. Ency. Law (2d ed.) 701; 38 Cyc. 84.

See cases cited below. Such a conversion may be ac-

5. complished, while the cotenant retains the common property in his possession, if such cotenant renders impossible any further enjoyment of it by his cotenant, or refuses to appropriate it to the uses for which it is designed, and appropriates it to uses for which it was not designed, or directly and positively excludes the cotenant from its use. *Needham v. Hill* (1879), 127 Mass. 133; *Agnew v. Johnson*

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(1851), 17 Pa. St. 373, 55 Am. Dec. 565; *Jacobs v. Seward* (1872), L. R. 5 H. L. 464; *Doyle v. Burns* (1904), 123 Iowa 488, 99 N. W. 195; *Roddy v. Cox* (1859), 29 Ga. 298, 74 Am. Dec. 64; *Allen v. Harper* (1855), 26 Ala. 686; *Delaney v. Root* (1868), 99 Mass. 546, 97 Am. Dec. 52; *Lobdell v. Stowell* (1872), 51 N. Y. 70; *Fiquet v. Allison* (1864), 12 Mich. 328, 86 Am. Dec. 54; *Bray v. Bray* (1874), 30 Mich. 479; *Grove v. Wise* (1878), 39 Mich. 161; *Tuttle v. Campbell* (1889), 74 Mich. 652, 42 N. W. 384, 16 Am. St. 652; *Ballentine v. Joplin* (1898), 105 Ky. 70, 48 S. W. 417; *Waller v. Bowling* (1891), 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261; Freeman, Cotenancy (2d ed.) §313; 28 Am. and Eng.

Ency. Law (2d ed.) 713. If there is a conversion by

6. one cotenant, no demand is necessary. *Williams v.*

Rogers (1896), 110 Mich. 418, 68 N. W. 240; *Guyther v. Pettijohn* (1846), 28 N. C. 388, 45 Am. Dec. 499; *Waller v. Bowling, supra*. Such being the law, it follows

that the facts pleaded which show that appellants

4. obtained the interest of appellee's cotenant and retain the bonds in their possession do not contradict

the averment that they converted them to their own use, for it is possible for one cotenant to convert the common property as against the other cotenant, while retaining it in his possession. The specific acts alleged in the complaint are not the acts which constituted the conversion, they are merely acts by which defendants came into possession of the bonds. Even if they came rightfully into possession of them, they could have later converted them. We are not here concerned with the more difficult question of what evidence appellee would have to introduce to prove a conversion. Appellants have not brought the evidence before us, nor asked us to consider its sufficiency to support the decision of the trial court. We are concerned only with a question of pleading, and we hold that the averment of a conversion is sufficient, and that the complaint is good as against the demurrers of appellants for want of facts. The

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court might properly have sustained a motion to make
 7. the complaint more certain, by setting forth the particulars of the alleged conversion, had such a motion been made by appellants. *Proctor v. Cole, supra.*

No error appearing, the judgment is affirmed. It having been made to appear that two of appellants have died since this appeal was taken, the judgment is affirmed as of date of submission.

NOTE.—Reported in 101 N. E. 657. See, also, under (1) 31 Cyc. 824; (2) 2 Cyc. 687; (3) 38 Cyc. 2068, 2069, 2071; (5) 38 Cyc. 84; (6) 38 Cyc. 2032, 2035; (7) 38 Cyc. 2069. As to the scope and effect of writs of error, see 91 Am. Dec. 193. As to conversion of personality sufficient to sustain action of trover, see 24 Am. St. 795.

AMERICAN CAR AND FOUNDRY COMPANY v. INZER, ADMINISTRATRIX.

[No. 7,976. Filed April 23, 1913.]

1. MASTER AND SERVANT.—*Injury to Servants.—Liability.—Statutes.—Operation of Railroad.*—A company engaged in the manufacture of cars, which in one department of its business operates locomotives, cars, or trains of cars upon a railroad track, so that the dangers incident are substantially the same as the hazards of operating trains on a commercial railroad, is liable for an injury to its servant employed in such department, within the provisions of the fourth clause of §8017 Burns 1908, Acts 1893 p. 294, making railroad companies liable for injuries resulting to employes in their service through the negligence of any person in charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive engine or train, etc., since the classification contemplated by the statute is with reference to the character of the employment and it is immaterial whether the employer is an individual, firm, or a public or private corporation. pp. 319, 321.
2. MASTER AND SERVANT.—*Injury to Servant.—Liability.—Statutes.*—Section 8017 Burns 1908, Acts 1893 p. 294, creating a liability for injuries to railroad employes by the negligence of any person in charge of any locomotive engine, train, etc., in its application to a manufacturing company, which in one department of its business operates locomotives and cars on railroad tracks, is to be restricted to that department which has to do with the opera-

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tion of trains and which exposes employes to the dangers incident to such operation. p. 321.

3. **MASTER AND SERVANT.—*Injury to Servant.—Complaint.***—A complaint to recover for the death of an employe, alleging that defendant is a corporation engaged in manufacturing cars, that its plant is upon a large tract of land and consists of yards, buildings and other structures, about which defendant maintained railroad tracks of standard gauge over which it operated locomotive engines and cars and trains of cars in the transportation of lumber, iron, coal and other freight and in hauling cars constructed and in course of construction, and that said tracks connected with the tracks of a railroad company, sufficiently shows that §8017 Burns 1908, Acts 1893 p. 294, creating a liability against railroads for injuries to employes through the negligence of any employe in charge of a locomotive engine, train, etc., applies to that department of defendant's business in which the employes are exposed to the dangers incident to the operation of trains. p. 321.
4. **APPEAL.—*Law of the Case.***—The prior decision of a cause on appeal becomes the law of the case on a subsequent appeal only in so far as it is applicable to the facts presented on such subsequent appeal. p. 323.
5. **MASTER AND SERVANT.—*Injury to Servant.—Liability.—Statutes.—Complaint.***—A complaint for the death of a servant employed by a manufacturing corporation, which in one department of its business operated locomotive engines, cars and trains of cars upon a railroad track, alleging that decedent's death was caused by the negligence of another employe in the operation of a locomotive, sufficiently shows a liability under §8017 Burns 1908, Acts 1893 p. 294, creating a liability for injuries caused by the negligence of any person in charge of a locomotive engine, train, etc., without alleging that decedent was employed to assist in the operation of trains and that he was so engaged at the time of the injury. p. 324.
6. **MASTER AND SERVANT.—*Injury to Servant.—Liability.—Last Clear Chance.***—Where an employe was engaged in tinning the roof of a car coupled to other cars, and through his own negligence fell from the car onto the track when a locomotive was coupled thereto, and while lying helpless upon the track was killed by the negligence of those in charge of the train in backing the engine over him, the company was liable for his death under the doctrine of last clear chance. p. 324.
7. **MASTER AND SERVANT.—*Injury to Servant.—Last Clear Chance.—Statutes.***—The last clear chance doctrine is applicable to the case of an employe thrown from a car through his own negligence and killed by the negligence of those in charge of the train in

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backing it over him, notwithstanding §8017 Burns 1908, Acts 1893 p. 294, creating a liability against railroad companies for injuries to employes through the negligence of any other employes in charge of any locomotive engine, train, etc., provides that the injured employe must have been in the exercise of due care and diligence, since such provision is but a restatement of the common-law rule that contributory negligence will preclude recovery, and the doctrine of last clear chance, while not an exception to such rule, is based upon the theory that the plaintiff's negligence does not contribute directly to the injury, but that such injury was proximately caused by the intervening negligence of defendant. p. 324.

From Clark Circuit Court; *William C. Utz*, Special Judge.

Action by Jennie Inzer, administratrix of the estate of John Inzer, deceased, against the American Car and Foundry Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

M. Z. Stannard, for appellant.

George H. Voigt, for appellee.

LAIRY, J.—This action was commenced in the Clark Circuit Court to recover damages from appellant for causing the death of John Inzer. This is the second appeal. On the first appeal the complaint was held insufficient and the judgment was reversed by the Supreme Court for that reason. *American Car, etc., Co. v. Inzer* (1909), 172 Ind. 56, 87 N. E. 722. An amended complaint was afterwards filed and a second trial resulted in a judgment for plaintiff and this appeal was taken. The amended complaint upon which the judgment appealed from was rendered is based on the Employer's Liability Act, §8017 Burns 1908, Acts 1893 p. 294. As shown by the allegations of this complaint the defendant was a corporation engaged in the manufacture of cars at the city of Jeffersonville. The deceased was at the time of his death employed by the defendant and was engaged in tinning the roof of a car standing in one of the buildings connected with the plant, and for the purpose of doing the work he occupied a position on top of the car. The

car upon which he was working was coupled to five other cars and while he was so engaged a locomotive engine, owned and operated by defendant, was coupled to the north one of these cars for the purpose of moving the six cars out of the building into the yard. Decedent was on the top of the fourth car from the engine and as this car passed through the door his body came in contact with the timbers at the top of the door and he was thrown to the track between the fourth and fifth cars. He was dragged under the front trucks of the fifth car a distance of fifty or sixty feet to a point where the car stopped outside the building in the yards of the defendant. After the car had stopped Inzer was lying across the rail immediately back of the front truck of this car. One of his legs was broken and he was in a helpless condition on account of his injuries. The complaint, in substance, alleges that while Inzer was so lying upon said track, one William Dolan, who was in the employ of defendant and who had charge of the train and who was authorized and required by defendant to direct its movements, negligently gave an order to the engineer to back the train; and that the engineer in obedience to the order so given backed the train causing the wheel to pass over the body of Inzer thus causing his death. It is alleged that Dolan before giving the order to back the train, was informed and knew that Inzer was under the train, and that, by the exercise of ordinary care, he could have known that he was in such a position that the backing of the train would cause his death.

If the Employer's Liability Act applies to the business in which appellant was engaged, it was responsible for the negligence of Dolan under clause four of that act;

1. but, if the act does not apply, Dolan was a fellow servant with Inzer and the master would not be responsible for any injury caused by his negligence. Appellant asserts that the act in question does not apply to it, for the reason that it is a private corporation and not a railroad

corporation engaged in operating a commercial railroad. The case of *Bedford Quarries Co. v. Bough* (1907), 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418, is cited to sustain this position. The decision in this case, when construed in the light of later decisions of the Supreme Court upon the same question, does not support appellant's contention. In this case it was said, "One rule of liability can not be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions." The law was upheld as constitutional in so far as it relates to the business of railroading upon the ground that it does not classify employers of labor, but that it does classify the business in which laborers are employed and places the business of railroading in a class to itself and makes the law applicable thereto. The classification is justified upon the ground that the well-known hazards incident to the operation of trains on railroads afford a sufficient reason inherent in the subject-matter to justify the classification. If the distinction thus made is to be maintained, we should not look to the character of the employers for the purpose of determining whether or not the law should apply, but we must look to the nature of the business in which they are engaged. If the business is the operation of cars and trains on a railroad under such circumstances as to expose employes to the dangers and hazards incident to the operation of a train, then the law should be held to apply to such business, whether it be conducted by an individual, a firm, a private corporation, or a public corporation. The Supreme Court in a recent case said: "If the character of the employer, within the meaning of the statute, is not important, and the nature of the employment is the test to be applied in construing the statute, the expression 'every railroad or other corporation operating within the State,' as applied to railroads, should, under the rule above stated, be enlarged and expanded so as to include any person, company, or corporation engaged in operating

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a railroad in this State.” *Pittsburgh, etc., R. Co. v. Lightheiser* (1907), 168 Ind. 438, 465, 78 N. E. 1033.

As construed by the Supreme Court the statute under consideration classifies the business in which employers of labor are engaged and places the business of railroad-

2. ing in a class by itself, and its application is further restricted to that department of the business which has to do with the operation of trains and which exposes employes to the dangers incident to such operation. *Richey v. Cleveland, etc., R. Co.* (1911), 176 Ind. 542, 96 N. E. 694.

Under the law announced in these decisions we must look to the character of the business in which the employer was engaged for the purpose of determining whether such

1. employer was operating cars and trains of cars upon a railroad under such conditions as expose employes or some of them to the hazards incident to the operation of trains. It is not necessary that the business should be the operation of a commercial railroad or that operating a railroad was the only business of the employer, or that it was even his principal business. If in one department of its business, appellee operated locomotives, cars, and trains of cars upon a railroad track, and if the dangers incident to such operation were substantially the same as are incident to the operation of trains on a commercial railroad, we can think of no good reason why the Employer’s Liability Act should not apply to that department of its business. The

allegations of the complaint with reference to the

3. character of the business in which appellee was engaged are as follows: “That at all times herein-after mentioned, defendant was and is now a corporation engaged in the manufacture of cars at its plant located in the city of Jeffersonville and town of Clarksville, in said county and State. That said plant was then and there located on a large tract of land and consisted of many buildings and other structures and

parts of said tract were then and there used as yards. That defendant then and there maintained railroad tracks of standard gage, such as are used by steam railroads, upon said tract of land and in and through some of said buildings, and then and there ran and operated locomotive engines and cars and trains of cars on and over said tracks, and then and there ran and operated said engines, trains and cars over said railroad tracks in the transportation of lumber, iron, coal and other freight and in hauling of cars constructed and in the course of construction at said plant; and defendant then and there daily and continuously maintained and operated a railroad on said tract of land for all purposes above specified. That said railroad tracks then and there connected with the tracks of the Baltimore and Ohio Southwestern Railroad operated through the state of Indiana." By an application of the principles before stated we have reached the conclusion that the facts thus stated show that the statute under consideration applies to that department of appellant's business in which its employes are exposed to the dangers incident to the operation of trains.

The Supreme Court on the first appeal did not pass upon the question here presented. The portion of the complaint upon which the decision is based is set out in the opinion and is as follows: "In said building there was a railroad track which was laid lengthwise in said building, and which extended through the same and outside and through the yard of said defendant, upon which said plant was then and there located, and connected with the Baltimore and Ohio Southwestern Railroad Company." *American Car, etc., Co. v. Inzer, supra.* The part of the complaint quoted does not show that appellant as a part of its business operated cars coupled together in trains and propelled by locomotives in such a way as to expose its employes to the dangers incident to the operation of trains. While we recognize that the decision referred to is the law of the case

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so far as applicable, we think that the facts presented

4. by the amended complaint differ so materially from the facts stated in the complaint which was held insufficient on the former appeal as to make the decision on the former complaint inapplicable to the complaint before us. The conclusion reached necessarily results from an application of the principles announced and applied by the Supreme Court, and it is also amply supported by decisions from other states. *Mace v. Boedker & Co.* (1905), 127 Iowa 721, 104 N. W. 475; *Kline v. Minnesota Iron Co.* (1904), 93 Minn. 63, 100 N. W. 681; *Roe v. Winston* (1902), 86 Minn. 77, 90 N. W. 122; *Bird v. U. S. Leather Co.* (1906), 143 N. C. 283, 55 S. E. 727; *Coughlan v. Cambridge* (1896), 166 Mass. 268, 44 N. E. 218; *Alabama Steel, etc., Co. v. Griffin* (1907), 149 Ala. 423, 42 South. 1034; *McCord v. Cammell* (1895), 1896 App. Cas. 57; *Doughty v. Firbank* (1883), 10 Q. B. Div. 358; *Cunningham v. Neal* (1908), 101 Tex. 338, 107 S. W. 593, 15 L. R. A. (N. S.) 479; *Hairstone v. United States Leather Co.* (1906), 143 N. C. 512, 55 S. E. 847, 10 Ann. Cas. 698; *Hemphill v. Buck Creek Lumber Co.* (1906), 141 N. C. 487, 54 S. E. 420; *Papkovich v. Oliver Iron Mining Co.* (1909), 109 Minn. 294, 123 N. W. 824; *Woodward Iron Co. v. Sheehan* (1910), 166 Ala. 429, 52 South. 24; *Keystone Mills Co. v. Chambers* (1909), 118 S. W. (Tex. Civ. App.) 178; *McKnight v. Iowa, etc., Constr. Co.* (1876), 43 Iowa 406; *Schus v. Powers-Simpson Co.* (1902), 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887; *Kibbe v. Stevenson Iron, etc., Co.* (1905), 136 Fed. 147, 69 C. C. A. 145; *Bissell v. Greenleaf-Johnson Lumber Co.* (1910), 152 N. C. 123, 67 S. E. 259; *Glines v. Oliver Iron Mining Co.* (1909), 108 Minn. 278, 122 N. W. 161; *Robertson v. Greenleaf-Johnson Lumber Co.* (1911), 154 N. C. 328, 70 S. E. 630; *Hines v. Stanley, etc., Mfg. Co.* (1908), 199 Mass. 522, 85 N. E. 851.

The allegations of the complaint sufficiently show that the employment of Inzer was of such a character as to ex-

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pose him to the hazards incident to the operation of
5. trains and that the injury which caused his death resulted from such a hazard. It is sufficient in this respect. It is not necessary to allege that he was employed to assist in the operation of trains and that he was so engaged at the time he received his injury. *Richey v. Cleveland, etc., R. Co., supra.*

Appellant contends that the doctrine of last clear chance does not apply to the facts as disclosed by the pleadings and proof in this case. With this contention we cannot
6. agree. The negligence relied on was the giving of the signal to back the train at a time when Inzer was lying in a helpless condition just back of the front truck of the fifth car. It may be conceded that his perilous situation on the track was the result of his contributory negligence, but it is apparent that he was in a situation where the utmost diligence on his part was unavailing to prevent the injury. At that time his negligence ceased and if the appellant after that had an opportunity to avoid injuring him and negligently failed to avail itself of such opportunity, it would be liable under the doctrine of last clear chance. The doctrine has been recently discussed by this court and we do not feel called upon to further enlarge upon the subject. *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. —, 96 N. E. 973; *Evansville, etc., Traction Co. v. Spiegel* (1912), 49 Ind. App. 412, 94 N. E. 718, 97 N. E. 949. It is argued that the doctrine does not

7. apply to a case where the injury results from a breach of duty imposed by the Employer's Liability Act for the reason that such act provides that the injured employe at the time must have been in the exercise of due care and diligence. This is but a statutory announcement of the common-law rule that the contributory negligence of a servant will preclude him from recovering on account of the master's negligence. *Pittsburgh, etc., R. Co. v. Lightheiser, supra.* This rule applies to all cases regardless of

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whether the negligence of the master arises from the breach of a common-law duty or whether it arises from the breach of a duty imposed by statute. The doctrine of last clear chance is not recognized as an exception to this rule, but its application to certain classes of cases is sustained upon the theory that in such cases the negligence of the plaintiff does not contribute directly to the injury, but is only a remote cause or condition which makes the injury possible. In such cases the subsequent intervening negligence of the defendant is regarded as the proximate cause. *Indianapolis Traction, etc., Co. v. Croly, supra*; *Evansville, etc., Traction Co. v. Spiegel, supra*. We see no reason why the doctrine of last clear chance should not be held to apply in cases such as this.

Our discussion of the questions already considered covers the questions presented by the motion for judgment on the interrogatories to the jury and by the motion for a new trial.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 676. See, also, under (1) 26 Cyc. 1079; (3) 26 Cyc. 1392; (4) 3 Cyc. 399; (5) 26 Cyc. 1395; (6) 29 Cyc. 530. As to contributory negligence in the case of a railroad employe occupying a dangerous position, see 33 Am. St. 765. For a discussion of the kind of railroad intended by a constitutional or statutory provision abrogating the fellow servant doctrine as to railroad employes, see 8 Ann. Cas. 1086.

SHAFFER v. SHAFFER.

[No. 8,410. Filed April 24, 1913.]

1. DIVORCE.—*Alimony.—Discretion of Court.*—The amount of alimony to be awarded in each particular case is largely within the discretion of the trial court, and, unless an abuse of this discretion is shown, a cause will not be reversed on appeal on the ground that the alimony allowed is excessive. p. 326.

From Pike Circuit Court; John L. Bretz, Judge.

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Action by John L. Shafer against Myrtle Shafer. From a judgment for plaintiff, the plaintiff appeals. *Affirmed.*

John L. Sumner and Stanly M. Krieg, for appellant.

E. P. Richardson and A. H. Taylor, for appellee.

LAIRY, J.—This was a suit for divorce in which a decree was granted appellant, and a judgment for alimony in the sum of \$1,400 was awarded appellee. The correctness of the judgment, in so far as it relates to the dissolution of the marriage, is not questioned, and the only question which appellant seeks to present by this appeal relates to the amount of the alimony awarded to appellee.

From an examination of the facts disclosed by the

1. evidence we are inclined to believe that the amount of alimony awarded was large, but it is not so clearly excessive as to show an abuse of the discretion vested in the trial court. The amount of alimony to be awarded in each particular case is largely within the discretion of the trial court and unless an abuse of this discretion is shown, this court will not reverse a case upon the ground that the alimony allowed is excessive. *Watson v. Watson* (1906), 37 Ind. App. 548, 77 N. E. 355; *Woodburn v. Woodburn* (1911), 47 Ind. App. 696, 95 N. E. 268; *Powell v. Powell* (1876), 53 Ind. 513; *Snider v. Snider* (1913), 179 Ind. 583, 102 N. E. 32.

The judgment of the trial court is affirmed.

NOTE.—Reported in 101 N. E. 680. See, also, 14 Cyc. 749, 756, 773. As to power of the court to create and enforce liens for alimony, see 102 Am. St. 700. For a discussion of the proper proportion of the husband's estate to be awarded to the wife as permanent alimony, see Ann. Cas. 1913 A 803.

MYERS ET AL. v. MANLOVE.

[No. 7,930. Filed April 24, 1913.]

1. **WITNESSES.—Competency.—Parties.—Nature of Action.—Statutes.**—An action to obtain a money judgment on a promissory note is not included in the subject-matter of §522 Burns 1908, §499 R. S. 1881, rendering parties incompetent to testify in suits by or against heirs or devisees on a contract with or demand against the ancestor, to obtain title to or possession of property in the right of such ancestor, or to affect the same in any manner. p. 329.
2. **WITNESSES.—Competency.—Parties.—Action by Heirs Instead of Personal Representative.—Statutes.**—An action by the widow and only son of a decedent to recover on a note payable to decedent, is one which in contemplation of statute and the ordinary course of procedure is brought by the personal representative of the decedent, and is therefore controlled by §521 Burns 1908, §498 R. S. 1881, providing that in suits in which an administrator or executor is a party, wherein a judgment may be rendered for or against the estate, any party whose interest is adverse to such estate is incompetent to testify as to matters occurring in the lifetime of the decedent. p. 330.
3. **WITNESSES.—Power of Court to Require Witness to Testify.—Statutes.**—The power of the court to require a witness to testify, under §526 Burns 1908, Acts 1883 p. 102, authorizing the court in its discretion to require a party or other person, in certain cases of incompetency, to testify, is not limited to unwilling witnesses. p. 330.
4. **APPEAL.—Review.—Question Presented.—Discretion of Court in Requiring Witness to Testify.**—The question of the proper or improper exercise by the trial court of its power, under the provisions of §526 Burns 1908, Acts 1883 p. 102, to require a witness, otherwise incompetent, to testify, is presented where it appears that, after first holding the witness incompetent to testify as to matters occurring in the lifetime of the decedent, his testimony was received as permissible in the discretion of the court. p. 331.
5. **WITNESSES.—Requiring Incompetent Witness to Testify.—Discretion of Court.—Statutes.**—In an action on a note by the widow and only son of the deceased payee, the court, after holding that defendant was incompetent, in requiring him to testify, pursuant to the provisions of §526 Burns 1908, Acts 1883 p. 102, authorizing the trial court in its discretion to require parties or other persons to testify in certain cases of incompetency, did not abuse its discretion, where there was evidence, though remote and indefi-

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nite, which tended to establish the defense, and the facts presented were such as in all probability impressed the court that the ends of justice would be thereby subserved. pp. 331, 333.

6. WITNESSES.—*Requiring Incompetent Witness to Testify.—Discretion of Court.*—The determination of whether the court is justified in exercising the discretion granted by §526 Burns 1908, Acts 1883 p. 102, authorizing it to require parties or other persons to testify in certain cases of incompetency, must depend upon the particular facts in each case. p. 333.
7. EVIDENCE.—*Ownership of Note.—Assessment Sheets.*—In an action by the widow and only son of a deceased payee of a note, assessment sheets showing that the note had not been listed by the payee, were admissible in evidence on the question of the ownership of the note. p. 334.

From Fayette Circuit Court; *George L. Gray*, Judge.

Action by Mary L. Myers and another against Emery Manlove. From a judgment for defendant, the plaintiffs appeal. *Affirmed.*

D. W. McKee, H. L. Frost and R. N. Elliott, for appellants.

Conner, Conner & Chrisman, for appellee.

FELT, P. J.—This was a suit by appellants against appellee on a promissory note, a copy of which is as follows:

“Connersville, Ind., March 15, 1902.

Value received:

One day after date, I promise to pay to Calvin Myers or order Fifteen Hundred Dollars (\$1,500) with interest at four per cent per annum after date. Emery Manlove.”

The complaint is in the usual form of a suit on a note and also alleges that the payee of said note died intestate on February 17, 1906, leaving appellants, Mary L. Myers, his widow and Oliver P. Myers, his son, as his only heirs at law; that all the debts of Calvin Myers, deceased, had been paid in full and there was no administration on his estate. Appellee filed answer in two paragraphs. One setting up want of consideration and the other alleging no consideration for the note except the sum of \$400. A reply of gen-

eral denial to each of the answers was filed. Trial by jury resulted in a verdict for appellee. Appellants' motion for a new trial was overruled, judgment for appellee was rendered on the verdict and this appeal taken.

Appellant, Mary L. Myers, and appellee are brother and sister, children of Margaret Manlove, deceased, who died March 24, 1902. Appellee claims that appellant, Mary L. Myers, obtained possession of a large amount of cash which had belonged to their mother; that she knew he had knowledge of that fact; that said Mary L. was seeking to keep said funds from coming to the knowledge and possession of the legal representative of her mother's estate and to make distribution thereof herself; that the money for which said note was given was paid to him as a part of his distributive share of such funds; that instead of executing a receipt therefor as he intended to do, at the suggestion and request of said Mary L., he executed to her husband the note in suit as evidence of such payment and dated it March 15, 1902, though the transaction took place on April 1 after the death of their mother. Appellee offered himself as a witness in his own behalf and the court held that under the statute he was incompetent to testify to anything relating to the transaction which occurred prior to the death of the payee of the note. The court thereupon in the exercise of its discretion under §526 Burns 1908, Acts 1883 p. 102, required appellee to testify in the case. Appellants claim that this was an abuse of the discretion given the trial court by the statute; that his testimony was the only evidence tending to explain or impeach the consideration of the note or to show that it was in fact executed at a date other than that shown upon the instrument.

Appellants and appellee refer to §522 Burns 1908, §499 R. S. 1881, as controlling the question of appellee's competency as a witness. This section covers suits

1. "by or against heirs or devisees on a contract with or demand against the ancestor, to *obtain title to or pos-*

session of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner." This is a suit to obtain a money judgment on a promissory note, and is not included in the subject-matter of §522, *supra*. *Snyder v. Frank* (1913), *ante* 301, 101 N. E. 684, and cases cited. The suit here is by the widow and only

2. son of the deceased payee of the note who are prosecuting a suit that in contemplation of the statute, and in accordance with the usual course of procedure, would be brought by the administrator or executor of Calvin Myers, deceased. If the suit had been brought by such legal representative, the competency of appellee as a witness would then clearly have been controlled by §521 Burns 1908, §498 R. S. 1881. The subject-matter of this suit is clearly covered by §521, *supra*, and though the suit is by heirs instead of the legal representative of the decedent, it comes within the spirit of the section, which we hold controls the question of appellee's competency as a witness. *Clift v. Shockley* (1881), 77 Ind. 297, 299; *Taylor v. Duesterberg* (1887), 109 Ind. 165, 171, 9 N. E. 907; *Durham v. Shannon* (1888), 116 Ind. 403, 405, 19 N. E. 190, 9 Am. St. 860; *Sloan v. Sloan* (1898), 21 Ind. App. 315, 318, 52 N. E. 413. By virtue of the statute, appellee was incompetent to testify to matters occurring in the lifetime of the decedent. Being incompetent, the further question remains as to whether the trial court abused its discretion in allowing him to testify. Some questions are discussed as to whether the court required him to testify or only permitted him as a willing witness in his own behalf. It appears that the court and counsel on both sides practically agreed that he was an incompetent witness to the transactions named in the statute, and that the court only admitted his testimony on the theory that he had a right to do so in the exercise of the legal discretion conferred by §526 Burns 1908,

3. *supra*. It is evident that in practically all cases the party whose testimony is incompetent under the stat-

ute is willing to be "required" to testify and we are not inclined to narrow the application to unwilling witnesses, though there are some expressions in the decided cases indicating that such is the meaning of the statute.

4. Where it appears, as it does here, that the court held the witness incompetent to testify as to matters occurring in the lifetime of the decedent, and then received his testimony as permissible in the discretion of the court, the question of the proper or improper exercise of such discretionary power is presented.

Appellants offered evidence to show that the

5. date of the note showed the true date of the transaction and that the money obtained by appellee on the note belonged to the payee, Calvin Myers. Independent of the testimony given by appellee after the court permitted him to so testify, there was evidence tending to show that Calvin Myers never listed the note for taxation and that neither of appellants ever listed it for taxation until after this suit was instituted. That Margaret Manlove went to the home of appellee about two weeks prior to her death and soon after took sick and died without returning home; that she was very ill for ten days or more before her death and appellant Mary L. claimed to have been with her most of the time of her illness. Also that Margaret Manlove was a woman of means, eighty-four years of age at the time of her death; that she had lived alone on her farm of about 300 acres for about nine years after her husband's death; that she kept money about her house and was close and saving in her habits; that she had sometimes loaned money; that on the day of her death appellant, Mary L., and her brothers, John and George, went to her residence and searched it for money and other valuables; that they found hid away at different places in the cellar three quart tin cans sealed with wax each weighing about four pounds; that they were turned over to appellant, Mary L., before they were opened and none of the other children ever saw

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them again; that she admitted she found five dollars in money in one of the cans and claimed that they were filled with old rags; that she opened the cans out of the presence of any other person and up to the time of this trial never told any one what she found in them. John Manlove, one of the brothers, testified to finding an old ballot box containing papers and that "we also found some cans, sister Laura said contained money"; that he was at her home on April first after the death of their mother and she said "there was not quite as much money in the cans as you said there was"; that appellee, Emery Manlove, was present on that occasion and obtained some money from appellant and her husband and Mary L. told Emery to take the money he got and pay George. George Manlove testified that appellee paid off a mortgage he held against him for \$1,100 and some interest on April 14 following the death of their mother; that he turned the cans over to his sister and they were all about the same weight and made no noise when shaken. Appellant Mary L. testified that appellee obtained the money to pay a debt he owed his brother George who was pressing him for payment and that the money was paid him in cash by her husband in their house. When appellee was permitted to testify his evidence supported his contention as above stated. He also testified that when his mother came to his house she had a valise she carried with her; that when she got sick she turned the key to it over to him; that he and his sister, appellant, looked into it and it contained a large amount of paper money tied up in rolls; that after her death, his sister, Mary L., took charge of the valise and afterwards denied that it contained any money. He also testified that the paper money he received was musty. The evidence also showed there was litigation over the will of Margaret Manlove, and considerable enmity between appellant and her brothers.

In the recent case of *Miedreich v. Frye* (1908), 41 6. Ind. App. 317, 319, 83 N. E. 752, in discussing the court's discretion in hearing testimony it is said: "The solution of such question, whenever it arises, must depend upon the particular facts in each case." This we regard as the correct rule in determining whether the court in any case is justified in exercising the discretion given by the statute. It is not an arbitrary privilege granted the trial court, but nevertheless the statute is to be reasonably construed and applied to meet the particular ends of justice it was intended to subserve. The trial court sees the witnesses and has a better opportunity to draw correct inferences from the testimony than a court of appellate jurisdiction. In the case at bar there was some evidence, though remote and indefinite, tending to establish appellee's 5. defense to the note. Witnesses other than himself gave testimony tending to prove the note did not evidence the true date of the transaction. The use made of the money and the date of that transaction was significant. The long delay in trying to collect the note, in view of the strained relations of the parties is also a significant circumstance. The failure to list the note for taxation, the search for money immediately following the mother's death, and the remarks of appellant, Mary L., in connection therewith, when considered in the light of all the facts of the case would in all probability impress the trial court that the ends of justice would be subserved by the exercise of the discretion given by the statute. On the facts of this case we cannot say there was an abuse of the court's discretionary power. *Dearing v. Coulson* (1911), 48 Ind. App. 414, 96 N. E. 9. *Miedreich v. Frye*, *supra*, and *Williams v. Allen* (1872), 40 Ind. 295, are cited as conclusive upon the proposition that the court abused its discretion in calling appellee as a witness. In neither of these cases does it appear, as in this case, that the court held the witness incom-

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petent, and then heard the testimony in the exercise of the discretion granted by the statute. The conclusion reached in each of those cases is doubtless right under the rule above announced and the discussion in regard to willing or unwilling witnesses is neither important nor controlling when applied to the facts of this case. In the case of *Williams v. Allen, supra*, it is said: "At all events, the court was not given to understand that the evidence was sought under the provision of the act," and in *Miedreich v. Frye, supra*, "It appears from the record that the plaintiff was called in his own behalf, and, over the objection of defendant, was permitted to testify in detail and at length as to his employment by the decedent." In *Jones v. Hirshberg* (1907), 40 Ind. App. 88, 79 N. E. 1058, it was held to be an abuse of discretion to hear parol evidence of the contents of a written instrument from the plaintiff in the case in order to make out her case, but the opinion states: "Whether the court, in the admission of evidence, exceeds its discretion, must depend upon the particular facts of a given case." Our conclusion is not inconsistent with the questions decided in the cases above mentioned. As bearing on questions involved in this case we cite: *Sheets v. Bray* (1890), 125 Ind. 33, 36, 24 N. E. 357; *Perrill v. Nichols* (1883), 89 Ind. 444, 446; *Dowden v. Wood* (1890), 124 Ind. 233, 237, 24 N. E. 1042; *Colt v. McConnell* (1888), 116 Ind. 249, 253, 19 N. E. 106; *Bragg v. Stanford* (1882), 82 Ind. 234, 237.

The assessment sheets were clearly competent evi-

7. dence on the question of the ownership of the note.

The court might infer from the failure to list the note, that Calvin Myers did not claim to own the same and understood it did not evidence a debt due him. The assessment sheets were of some probative value on an issuable fact in the case. *Indiana, etc., Traction Co. v. Bena-dum* (1908), 42 Ind. App. 121, 124, 83 N. E. 261; *Ohlwine v. Pfaffman* (1913), 52 Ind. App. 357, 100 N. E. 777; *Towns v. Smith* (1888), 115 Ind. 480, 483, 16 N. E. 811.

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No available error is shown by the record. Judgment affirmed.

NOTE.—Reported in 101 N. E. 661. See, also, under (1) 40 Cyc. 2263; (2) 40 Cyc. 2266; (3) 40 Cyc. 2338; (4) 40 Cyc. 2339.

AMERICAN FIDELITY COMPANY OF MONTPELIER,
VERMONT, v. EAST OHIO SEWER PIPE COM-
PANY ET AL.

[No. 7,970. Filed April 24, 1913.]

1. SUBROGATION.—*Volunteers.—Public Improvements.—Contracts.—Compensation.—Assignment.*—One who pays the debt of a municipal contractor at his request, or who advances or loans him money with which to carry on the contract, is not a mere volunteer, and the payment of such debt or the making of such advances will support an assignment of the contractor's compensation. p. 339.
2. SUBROGATION.—*Payment by Surety.*—A surety seeking the benefit of subrogation must show that he has paid the obligation for which his principal was primarily liable. p. 340.
3. MUNICIPAL CORPORATIONS.—*Public Improvements.—Contractor's Bond.—Rights of Surety.—Subrogation.—Diligence.*—A surety on the bond of a municipal contractor for the construction of a public sewer, who failed to assert its rights to be subrogated to the money in the hands of the city until long after it had been assigned, and material men had brought an action against the surety, is barred by its laches from asserting a right to be subrogated to such money, since subrogation is founded in equity, and before equity may be invoked for purposes of subrogation, diligence must be shown. p. 341.
4. MUNICIPAL CORPORATIONS.—*Public Improvements.—Contractor's Bond.—Discharge of Surety.*—A surety on the bond of a municipal contractor for the construction of a public improvement is not discharged on the approval of the final assessment roll, and an action on the bond may thereafter be maintained against such surety. p. 343.
5. MUNICIPAL CORPORATIONS.—*Public Improvements.—Contractor's Bond.—Discharge of Surety.*—The surety on the bond of a municipal contractor for the construction of a public improvement is not discharged by the failure of the city to require evidence of the payment of all bills before accepting the work and approving the assessment roll, as contemplated by the specifications and by the contract and bond. p. 343.

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From Marion Circuit Court (17,579); *Charles Remster*, Judge.

Action by the East Ohio Sewer Pipe Company against Thomas J. Markey and others. From a judgment for plaintiff, the defendant, American Fidelity Company of Montpelier, Vermont, appeals. *Affirmed.*

Pickens, Moores, Davidson & Pickens, for appellant.

Joshua E. Florea, George Seidensticker, Adolph Seidensticker, Frank Seidensticker, Charles W. Smith, Henry Hornbrook, Albert P. Smith and Joseph E. Bell, for appellees.

SHEA, J.—Action by appellee, East Ohio Sewer Pipe Company, to recover the amount due for certain sewer pipe sold by it to Thomas J. Markey for use in constructing a sewer in the city of Indianapolis, under a contract between Markey, doing business under the name of Thomas J. Markey & Company, and said city. The action was primarily against said Markey and appellant, as principal and surety, respectively, upon a bond given to secure the performance of the contract. The city of Indianapolis, its comptroller, treasurer, and The Home Bond Company were made parties defendant because of the alleged assignment of the assessment roll arising from the construction of the improvement, to The Home Bond Company. The amended complaint was in one paragraph, to which a separate demurrer by The Home Bond Company was sustained. Answer in general denial by Thomas J. Markey. Appellant filed a cross-complaint against appellees and all of its codefendants, and a separate answer in three paragraphs to the complaint. Reply by appellee, East Ohio Sewer Pipe Company, in two paragraphs to appellant's answer. A separate demurrer by The Home Bond Company to the cross-complaint was sustained, and appellant declining to plead over, judgment was rendered in favor of The Home Bond

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Company on the cross-complaint. The cause as between appellee East Ohio Sewer Pipe Company and Thomas J. Markey and appellant, was tried by the court and a finding made that Markey was principal and appellant surety; that the property of Markey was subject to execution, and should be exhausted before any proceedings were taken against the property of appellant. Judgment against Markey and appellant for \$373.88 and costs. Appellant's motion for a new trial was overruled.

The errors assigned are, the sustaining of the demurrer of The Home Bond Company to the cross-complaint, and the overruling of appellant's motion for a new trial. We shall consider first the error assigned on the ruling of the court in sustaining the demurrer of The Home Bond Company to appellant's cross-complaint, the material allegations of which, are, in substance, as follows: That appellant is a corporation organized under the laws of Vermont, and doing a general surety and indemnity business in Indiana; that on September 20, 1907, Thomas J. Markey & Company entered into a written contract with the city of Indianapolis for the construction of a sewer in Maryland Street in said city; that appellant became surety upon their bond under the provisions of §8959 Burns 1908, Acts 1905 p. 219, §265. The terms of the contract required Thomas J. Markey & Company among other things, to pay all bills for labor and material used in the construction of the improvement, and to secure the faithful performance of this contract said bond was executed by Thomas J. Markey & Company as principal and appellant as surety; that the work was completed, approved and accepted by the city; that assessments were made in accordance with the statute providing for the construction of said sewer; that a portion of the assessments amounting to \$—— is now in the hands of E. J. Robison, ex-officio treasurer of Indianapolis, and that there is still due \$—— on account of said assessments;

that bonds have been prepared and sold, or are in the hands of George T. Breunig, city comptroller, for sale, to the amount of \$—— as provided by statute. Before the completion of the work, Markey & Company assigned its interest in the assessment roll to The Home Bond Company for money loaned or claimed to have been loaned them, and by virtue of said assignment, The Home Bond Company now claims to be the owner of the bonds and money held by the treasurer and comptroller, respectively, and claims the right to collect from them the amount which may subsequently be paid under said assessments; that The Home Bond Company furnished no material for, and performed no labor upon the improvement, and the money furnished by it, if any, was diverted by Markey & Company for claims other than for labor or material furnished; that during the construction of said work Markey & Company purchased of plaintiff, East Ohio Sewer Pipe Company, certain materials, which plaintiff claims were used in the construction of the sewer; that Markey & Company also incurred other debts for labor and material furnished, the amounts of which are unknown to appellant, and are unpaid, and that Markey & Company is insolvent; that unless the proceeds arising from the assessment roll are applied to the satisfaction of these claims, appellant will be compelled to pay the amount thereof, to the full sum of its bond. Prayer that a receiver be appointed to receive and hold the proceeds of the assessment roll, and that each of the defendants be required to appear and answer as to his interest in said fund; that the same, after payment of costs of this action, shall be applied to the payment of all claims owing by said Markey & Company for labor and material furnished, and used in the construction of the sewer, and for all other proper relief, etc.

It is earnestly insisted, in this case, that the court committed error in sustaining the demurrer to appellant's cross-complaint. The theory of the cross-complaint is that the

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rights of appellant and divers other creditors are superior to the rights of The Home Bond Company, the assignee of the assessment roll, who advanced certain sums of money to the principal, Markey, during the construction of the work, which, it is alleged in the cross-complaint, were not used for material or labor in the construction of the improvement, but were diverted by the principal and used for entirely different purposes. The question to be determined, is, which of the parties has the superior right to the fund in question, in the hands of the city, derived from the assessments upon property benefited. Formal demand is made for the appointment of a receiver to collect the fund thus arising and pay it over to appellant.

Appellant very earnestly argues that its rights in

1. respect to the money in the hands of the city officials, and the money thereafter to be realized from the collection of assessments and the sale of bonds, are superior, and that it should be subrogated thereto, citing and relying upon several authorities, the leading one of which is *Henningson v. United States Fidelity, etc., Co.* (1908), 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, in which it is held that the doctrine of subrogation was applicable to the surety on the bond, and that he was entitled to the fund as against the bank, which was the lender of money to the contractor. The cases of *Aetna Life Ins. Co. v. Middleport* (1888), 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, and *Prairie State Bank v. United States* (1896), 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, cited by appellant, are to the same effect. Appellee insists that these cases are all governed by the rule of the unlawful assignment of the assessments, for the reason that such assignment is prohibited by the statutes of the United States, (Revised Statutes U. S. §§3477, 3737) which prohibit any contractor from assigning money due or to become due him, and attempted assignments are declared to be invalid, so that under such legal status, it is insisted that the holder of such an assignment could claim no equi-

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table rights as against a surety upon a contractor's bond. The above cases all treat the lender of money to a contractor under the circumstances disclosed in the cross-complaint in this case, as a mere volunteer, and a stranger to the contract. This cannot be held to be the law in this case. In the case of *Warford v. Hankins* (1898), 150 Ind. 489, 50 N. E. 468, it is said: "Nor is one who pays a debt or advances money for the purpose, at the request of the debtor, a mere volunteer. * * * (Citing authorities.) In 3 Pomeroy Eq. Jurisp. §1212, it is said: 'The doctrine is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage or advances money for its payment, at the instance of a debtor party and for his benefit; such a person is in no true sense a mere stranger and volunteer.' "

In support of the ruling of the trial court it is

2. further urged that the cross-complaint is bad for the reason, in the first instance, that there is no allegation that appellant has paid any money on account of its suretyship. In the case of *Henningsen v. United States Fidelity, etc., Co., supra*, the money had been actually paid by the surety. In the case of *Aetna Life Ins. Co. v. Middleport, supra*, it is held that the doctrine of subrogation and equity requires that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's right. It is settled in this State that: "The application of the doctrine of subrogation requires (1) that a person must have paid a debt due to a third person, for the payment of which another was in equity primarily liable." *Opp v. Ward* (1890), 125 Ind. 241, 24 N. E. 974, 21 Am. St. 220, 243. See, also, *Townsend v. Cleveland Fire Proofing Co.* (1897), 18 Ind. App. 568, 574, 47 N. E. 707. The security must first pay the debt, and can then himself enforce the securities. Sheldon, Subrogation (2d ed.) §115; *First Nat. Bank v. Wood* (1877), 71 N. Y. 405, 27 Am. Rep. 66; *Freehold Banking Co. v.*

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Brick (1875), 37 N. J. L. 307; *Hall v. Horsey* (1877), 84 Ill. 616; 27 Am. and Eng. Ency. Law (2d ed.) 203, 204; *Glass v. Pullen* (1869), 69 Ky. 346. The language of the cross-complaint would warrant the court in reaching the conclusion that no money had actually been paid. It is alleged that "the persons furnishing labor and material * * * have in equity a right to have said funds applied to the satisfaction of their said claims pro rata, and that unless the same are so applied, this cross-complainant will be compelled to pay the amount thereof to the full penalty of its said bond."

It is further insisted that the statutes of this State not only do not expressly prohibit assignments, but really recognize the right of a contractor to assign, appellee cites in support of his contention §§8713, 8714, 8725 Burns 1908, Acts 1907 p. 167, Acts 1905 p. 219, §§109, 120. In the case of *Aetna Indemnity Co. v. Wassall Clay Co.* (1912), 49 Ind. App. 438, 97 N. E. 562, the right of the contractor to assign the bonds, assessment-roll money, etc., to obtain money to finance the improvement, was presented on the complaint, and was not questioned by the parties to the issue. The question of the equitable rights of the parties was presented, but not decided because the assignee of the assessment roll was not a party to the action.

It is also a well-settled principle that before equity
3. may be invoked for the purpose of subrogation, diligence must be shown. *Thomas v. Stewart* (1889), 117 Ind. 50, 18 N. E. 505. There is no allegation in the cross-complaint explaining why there was delay in seeking the remedy therein demanded until a suit was actually brought by a materialman to recover the amount due him for material furnished by him and used in the construction of the improvement. In *Gring's Appeal* (1879), 89 Pa. St. 336, it is held that, "the right to subrogation is one of equity merely, and due diligence must be exercised in asserting it. Laches in taking advantage of the right will

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forfeit it as against one who is injured by such laches. In the case of *Wilkins v. Gibson* (1900), 113 Ga. 31, 38 S. E. 374, 84 Am. St. 204, it was held that if the person claiming the right of subrogation has unreasonably delayed in asserting such right, and in the meantime other persons have so acted in the premises that to assert the right of subrogation would be inequitable, subrogation will not be allowed. In the case of *Shattuck v. Belknap Savings Bank* (1901), 63 Kan. 443, 65 Pac. 643, it is said: "The right of subrogation, and, as well, the right to make payment of a prior lien upon which the claim of subrogation may be predicated, like all other rights, may be waived or abandoned." The case of *Watts v. Eufaula National Bank* (1884), 76 Ala. 474 holds that: "Subrogation, being an equity springing from the relation between the parties, and created and enforced for the benefit and protection of the one in whose favor it is originated, may be asserted or waived at pleasure." See, also, Sheldon, *Subrogation* (2d ed.) §41, *et seq.* "The right of subrogation is one of equity merely, and due diligence must be exercised in asserting it. Laches in taking advantage of the right will forfeit it, and subrogation is not allowed in favor of one who has permitted his equity to sleep in secrecy until the rights of others would be injuriously affected by its enforcement." 37 Cyc. 387, 388; *Thomas v. Stewart, supra*; *Gring's Appeal, supra*; 27 Am. and Eng. Ency. Law (2d ed.) 270. There is also an absence of averment in the cross-complaint that appellant was obliged, upon failure of Thomas Markey to fulfill his contract, to complete the obligation, and pay out money in that behalf. Appellant, in order to recover upon its cross-complaint, must show by averment of fact that it is entitled to subrogation, else the cross-complaint can not be held good as against a demurrer. We see no reason why the principles laid down in the foregoing authorities should not be applied. No sufficient reason is given for invoking a different rule because this is an improvement by a munici-

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pality, paid for by assessment. The cross-complaint does not show that appellant was without knowledge of the assignment of the assessment roll; no reason is given for the delayed action by appellant, nor is it disclosed that the money for which appellant is liable, or any part of it, has actually been paid, therefore it is the opinion of the court that for these reasons no error was committed in sustaining appellee's demurrer to the cross-complaint.

In support of its motion for a new trial appellant
4. contends that the bond ceased to be operative upon the approval of the final assessment roll, and that no action could be maintained upon it subsequent to that time. This question has been decided adversely to appellant's contention in a late case by the Supreme Court. *Aetna Indemnity Co. v. Indianapolis, etc., Fuel Co.* (1912), 178

Ind. 70, 98 N. E. 706. The further contention that
5. the city's failure to require evidence that all bills had been paid before accepting the work and approving the assessment roll as contemplated by section 19 of the general specifications adopted by the Board of Public Works of the City of Indianapolis, and by the terms of the contract and bond sued upon made a part thereof, was a material deviation from the terms of said contract, and released the surety, has also been decided adversely to appellant in the same case.

The evidence fully sustains the verdict, and no error was committed in overruling appellant's motion for a new trial. Judgment affirmed.

NOTE.—Reported in 101 N. E. 671. See, also, under (1) 4 Cyc. 31; 37 Cyc. 468; (2) 37 Cyc. 406; (4) 28 Cyc. 1041. As to the nature, origin and kinds of subrogation and particularly as to voluntary payments and volunteers, see 99 Am. St. 493.

NELSON v. MCKEE.

[No. 7,854. Filed October 11, 1912. Rehearing denied April 25, 1913.]

1. **TRIAL.—*Special Findings.—Failure to Find Essential Fact.***—Where the facts are specially found, the failure to find a material fact is equivalent to a finding against the party having the burden of proving same. p. 347.
2. **SUBROGATION.—*Right to Subrogation.—Volunteer.***—Subrogation is a creature of equity, but it is not applicable in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and it is not allowed where it would work any injustice to the rights of others. p. 348.
3. **SUBROGATION.—*Right to Subrogation.***—The fact that money is furnished to pay off existing liens, or for like purposes, on new security which afterwards proves to be defective or insufficient, is not a sufficient showing to give to such person the right of subrogation under the liens or claims so paid. p. 353.
4. **SUBROGATION.—*Superiority of Equities.***—Where there is no superior equity, or where the equities are equal, subrogation cannot be successfully invoked. p. 354.
5. **MORTGAGES.—*Judgment Lien.—Subrogation.***—One's claim to subrogation under a mortgage, for the payment of which he furnished the money, taking to himself a new mortgage, is not justified by the fact that the holder of a judgment lien junior to such original mortgage is not harmed thereby. p. 354.
6. **MORTGAGES.—*Judgment Lien.***—One furnishing money for the payment of another's mortgage, and taking to himself a mortgage as security for the money advanced, is charged with knowledge that judgment and other liens may have attached after the execution of the original mortgage, and which, upon its satisfaction, will become prior liens to his mortgage. p. 354.
7. **SUBROGATION.—*Right to Subrogation.—Purchaser of Mortgage.***—Where, subsequent to the execution of a mortgage on property, a judgment lien was acquired against the property, and thereafter a depositor of the bank holding such mortgage took an assignment of mortgage, which was reported to the mortgagor, who consented thereto provided the interest rate be reduced, which was done, and a new mortgage was thereupon made to such depositor who released the original mortgage of record, such depositor did not become subrogated to the rights of the bank so as to make his rights under the second mortgage superior to the

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judgment lien, and consequently the purchaser of the land, who assumed to pay such subsequent mortgage, acquired no right of subrogation under such original mortgage. p. 354.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Action by Effa B. McKee against John A. Nelson. From a judgment for plaintiff, the defendant appeals. *Reversed*.

C. W. Dice, for appellant.

A. T. Livengood and *V. E. Livengood*, for appellee.

FELT, J.—Appellee brought this action to quiet title to certain land owned by her against a personal judgment secured by appellant against appellee's grantor while the latter was the owner of said land. Appellant's single assignment of error is that the trial court erred in its conclusions of law based upon its special finding of facts. The finding, in substance, is as follows: That on March 8, 1905, one Thomas J. White, conveyed to Elbert E. McKee the lands described in appellee's complaint; that on March 8, 1905, the Kingman Bank, of Kingman, Indiana, loaned to said McKee the sum of \$1,335, evidenced by his promissory note, secured by a mortgage upon said real estate, executed by said McKee and wife, appellee herein; that said mortgage was duly recorded and was the sole and only lien on said real estate at the time of its execution; that on Nov. 30, 1906, appellant recovered judgment in the Fountain Circuit Court upon a promissory note, against the said Elbert E. McKee, in the sum of \$365 and costs, which judgment is unpaid; that on December 28, 1906, appellant caused an execution to be issued on said judgment and thereupon all the property of said Elbert E. McKee was duly appraised according to law and the same, including his interest in the real estate in controversy, was appraised for less than \$600 and was duly claimed by him as exempt from execution; that said Elbert E. McKee was at the rendition of said judgment and thereafter during all the transactions connected with this suit, a resident householder of Fountain

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County, State of Indiana, the husband of appellee; that one Albert Marshall was a depositor of said Kingman Bank and had money he desired to loan upon real estate security and so informed one Booe, the cashier of said bank; that said cashier informed said Marshall of the mortgage held by the bank on McKee's land and that the same was drawing 8 per cent interest and was a first lien upon the land; that there was due thereon the sum of \$1,395 and the bank would sell and transfer the note and mortgage to him and thereupon said Marshall agreed to so purchase the same if it was satisfactory to said McKee; that said cashier informed McKee of said proposal and he reported it satisfactory except he desired to reduce the rate of interest to 7 per cent; that said cashier reported such fact to Marshall, who thereupon agreed to the change of interest and proposed to take a new note and mortgage upon the same lands for the amount due the bank, which proposition was accepted and in pursuance thereof, on August 3, 1907, said McKee executed to said Marshall his note for \$1,395, due in one year and bearing 7 per cent interest; that to secure the same, his wife joining therein, he executed a mortgage upon said real estate; that the money so obtained was at the instance of said McKee used to pay the mortgage to said bank; that said Marshall believed his said mortgage was the first and only lien on said real estate and was ignorant of the judgment of appellant; that said McKee approved the action of the bank in securing said loan and the mortgage to the bank was on September 7, 1907, duly released of record; that on December 24, 1907, said McKee, appellee, joining him, executed a mortgage upon said real estate to one Jesse M. Inlow for \$503.55, which remains unpaid; that on March 25, 1909, said McKee conveyed said real estate by quitclaim deed to his wife, appellee herein, for the consideration of \$2,000, she assuming the Marshall and Inlow mortgages as part of the purchase price; that on March 25, 1909, all of Elbert E. McKee's property, was of the

value of \$500; that appellee, at the time of the conveyance of said real estate to her, had actual knowledge of appellant's judgment and said real estate was of the actual value of \$2,000 and has never been worth less than that amount.

As its conclusions of law upon such facts the court found that appellee was entitled to have her title to the real estate quieted as against appellant's judgment. Appellant contends that when the mortgage to the Kingman Bank was paid and satisfied, his judgment became the first lien upon the real estate in question; that the same cannot be held junior to the mortgages executed to Albert Marshall and said Inlow subsequent to the date of his judgment. Appellee contends, and the trial court held, that on the facts found, said Marshall was subrogated to the rights of the bank under its mortgage; that appellee's grantor was at the time of the conveyance, a resident householder of the State, all of whose property was worth less than \$600; that appellee obtained the benefit of Marshall's right of subrogation and took the conveyance of the real estate in question free from any lien or incumbrance by virtue of appellant's judgment.

Two principal questions are presented: (1) Was Marshall subrogated to the rights of the bank? (2) If so, can appellee claim the benefit of such subrogation against the rights of appellant? There is no finding of facts showing any misrepresentation or fraud practiced by said Elbert E. McKee or the bank to induce said Marshall to make the loan and accept the mortgage, nor is there any finding showing any diligence on the part of said mortgagee to ascertain from the public records or other sources the existence of judgments, liens or conveyances affecting the security of his loan. Nor is there any finding to the effect that the release of the mortgage was procured by fraud or misrepresentation on the part of said McKee, or of any one. The

1. failure to find such facts, under numerous decisions of this and our Supreme Court, is equivalent to a

finding against the party having the burden of proving them. *Ayers v. Adams* (1882), 82 Ind. 109, 111; *Heiney v. Lontz* (1897), 147 Ind. 417, 420, 46 N. E. 665.

The court finds that the bank was desirous of procuring the money on the McKee mortgage; that Marshall was a depositor of the bank desiring a loan; that the cashier of the bank informed him of the McKee mortgage and he agreed to purchase and take an assignment of the same; that this arrangement was reported by the cashier to McKee who consented to the arrangement, provided the interest was changed from 8 to 7 per cent; that this fact was reported to Marshall who thereupon agreed to loan the money at 7 per cent and requested the execution of a new mortgage which was duly executed and the mortgage of the bank thereafter released of record. The case is wholly unlike those where there was an express agreement for subrogation or the original mortgage was to be kept alive for the use and benefit of the party furnishing the money and through mistake or fraud the same was thereafter released. The question arises, Was Marshall a volunteer, or were his relations to the transaction such as to entitle him to be subrogated to the rights of the bank under its mortgage which was paid and satisfied?

Sheldon, Subrogation (2d ed.) §1, in defining sub-

2. rogation, states: "It is treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, independently of any contractual relations between the parties to be affected by it. It is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter; but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another for which neither he nor his property was answerable, and it is not allowed where it would work any injustice to the rights of others."

the same author, also states, §3: “• • • And there will be no subrogation unless the payment was made either under compulsion, or for the protection of some interest of the party making the payment, and in discharge of an existing liability. The demand of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished; but the doctrine of subrogation will be applied to reimburse one who has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property.” See, also, Sheldon, Subrogation (2d ed.) §8. In the case of *Binford v. Adams* (1885), 104 Ind. 41, 3 N. E. 753, our Supreme Court considered a case where it was claimed that a third party who had paid the debt of another, was entitled to the right of subrogation. In that case the facts show that the bank held a note of one Walker and that one Binford came with him to the bank and paid the note, and at his request, it was delivered to him without cancellation. The bank officers testified that nothing was said about purchasing the note, and that the note was not purchased from the bank. The court on page 42 used the following language: “Binford was a mere volunteer, for he was a stranger to the transaction, without any interest to protect or rights to preserve. The case does not, therefore, come within the rule, that where payment is made by one who has some interest in protecting property against the enforcement of a claim, or who has junior rights to guard, equity will subrogate him to the rights of the person whose claim he has paid; but it is within the general rule, that where a claim is paid by a third person having no existing interest in the matter it is an extinguishment of the claim.” A person who may be compelled to pay a debt, or the protection of whose property or interest requires that he pay it, is not a volunteer and in some instances where peculiar and exceptional

equities are involved, a third person who advances money for the payment of incumbrance upon real estate, may be subrogated to the rights of the party whose debt was paid; but in all such instances, there must be something more than the voluntary act of making a loan to provide the money with which to pay and discharge an existing mortgage or other lien. In *Heiney v. Lontz*, *supra*, 423, our Supreme Court by Hackney, J., in discussing this question said: "However, it has been held that one who advances money for the payment of an incumbrance, upon the promise merely of repayment, without any interest of his own to protect and without promise of subrogation, and, we may add, without fraud or imposition upon him, is not entitled to subrogation. *McClure v. Andrews* [1879], 68 Ind. 97; Sheldon, *Subrogation* (2d ed.) §3; *Shinn v. Budd* [1862], 14 N. J. Eq. 234; *Webster and Goldsmith's Appeal* [1878], 86 Pa. St. 409; *Guy v. DuUprey* [1860], 16 Cal. 195, 76 Am. Dec. 518. The cases of *Sidener v. Pavey* [1881], 77 Ind. 241; *Johnson v. Barrett* [1889], 117 Ind. 551 [19 N. E. 199, 10 Am. St. 83], and *Spaulding v. Harvey* [1891], 129 Ind. 106 [28 N. E. 323, 13 L. R. A. 619, 28 Am. St. 176], each contain an element of fraud in the procurement of the second loan from which the first, and the lien incident thereto, are discharged. They are not, therefore, in point upon this question." This court in *Townsend v. Cleveland Fire Proofing Co.* (1897), 18 Ind. App. 568, 577, 47 N. E. 707, said: "Subrogation is an equitable and not a legal right. Being the creature of equity, it will not be enforced where it will work an injustice to the rights of those having equal equities. * * * Where one person deals with another and has it in his power to make his own terms so as to secure himself against loss, but fails to do so, he cannot then invoke the equity of subrogation." The controlling facts in the case of *Watson v. Wilcox* (1876), 39 Wis. 643, 20 Am. Rep. 63, are similar to those of the case at bar and on page 649 the Supreme Court of

that state said: "The claim of the appellant to be subrogated to Sarah Ann Hodson, mortgagee of the premises in controversy under George and Harriet Harvey; that is, to have his mortgage subrogated to hers. Before the appellant took his own mortgage from George and Harriet Harvey, he was a stranger to the title, and had no connection with the mortgage debt due to Sarah Ann Hodson. His action in the premises was voluntary. He first proposed to purchase the Hodson mortgage, but subsequently abandoned that intention and advanced the amount due upon it for the Harveys, for the express purpose of satisfying and canceling the Hodson mortgage. This was done; the appellant thereupon taking a new mortgage for his own security. It is difficult to see how the doctrine of subrogation can aid him." In *Fort Dodge, etc., Loan Assn. v. Scott* (1892), 86 Iowa 431, 53 N. W. 283, the Supreme Court of Iowa had under consideration a question similar to the one at bar, and on pages 434, 435 said: "It will be observed from the foregoing statement of facts that the defendant's judgment became a lien upon the lots in question at the time of its rendition, December 16, 1887, junior to said three prior mortgages, and so continued at the time the plaintiff took its mortgage, January 6, 1888. By the satisfaction of said three mortgages the defendant's judgment became a first lien, unless under the law and the facts the plaintiff is entitled to be subrogated to the rights of the mortgagees in said three prior mortgages. The plaintiff's contention is that, as it furnished the money with which said mortgages were paid under an agreement that it should be so applied, it is entitled to have the satisfaction of said mortgages cancelled, and to be subrogated to all the rights of the mortgagees. The right to subrogation rests upon equitable grounds, and is never granted as a reward for negligence. While it may be true, as claimed, that no equities inhere in the defendant's lien, that it is simply a lien given by law, it is certainly as true that the plaintiff's claim is equally

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void of equities. The position of the plaintiff is the result of its own negligence. It relied upon an abstract of title which was not brought up to date, and which failed to note the pendency of this defendant's action, or the judgment in his favor. * * * Surely equity will not reward such negligence by applying the doctrine of subrogation in favor of the negligent party. To do so would encourage carelessness in taking such securities. The following language of this court in *Mather v. Jenswold* [1887], 72 Iowa 550 [32 N. W. 512, 34 N. W. 327], is directly applicable, and decisive of the question under consideration: 'The only question in the case is whether the plaintiff is entitled to have the satisfaction of the Simmons mortgage set aside, and that he be subrogated to all the rights of Simmons. It seems to us that he is not entitled to such relief. The plaintiff made the loan to Lord for the express purpose of paying the Simmons mortgage. It was well understood that the plaintiff was to accept a new mortgage, and the plaintiff got all he bargained for. There was no mistake, except that the plaintiff failed to exercise the diligence required in the examination of the records, and, therefore, failed to discover the existence of the judgment and the sale thereunder. No one can be blamed, but he must suffer loss, simply because he was negligent. There is no principle that will allow him to take advantage of that to the injury of the diligent.' '' To the same effect are the following: *Wilkins v. Gibson* (1900), 113 Ga. 31, 38 S. E. 374, 84 Am. St. 204, 219, 220; 38 S. E. 374; *Small v. Stagg* (1880), 95 Ill. 39; *Webster and Goldsmith's Appeal* (1878), 86 Pa. St. 409; *Wormer & Son v. Waterloo Agri. Works* (1882), 62 Iowa 699, 702, 703, 14 N. W. 331; *Levy v. Martin* (1880), 48 Wis. 198, 206, 4 N. W. 35; *Wentworth v. Tubbs* (1893), 53 Minn. 388, 397, 55 N. W. 543; *Stearns v. Godfrey* (1839), 16 Me. 158, 162; *Cole v. Malcolm* (1876), 66 N. Y. 363, 367; *Shinn v. Budd* (1862), 14 N. J. Eq. 234, 238; *Kitchell v. Mudgett* (1877), 37 Mich. 81,

86; *Wooldridge v. Scott* (1879), 69 Mo. 669; *Cohn v. Hoffman* (1887), 50 Ark. 108, 6 S. W. 511; *Howell v. Bush* (1877), 54 Miss. 437; *Capen v. Garrison* (1906), 193 Mo. 335, 92 S. W. 368, 5 L. R. A. (N. S.) 838 note. The later decisions show a broader and more liberal application of the doctrine than originally obtained and evidence a divergence of views with reference to volunteers or strangers to the original transaction. It would be a difficult and perhaps hopeless task to undertake to fully reconcile the numerous cases. However, it is apparent that the conflict of authority is more in the language employed in the decisions than in the questions actually decided by the courts. The prevailing weight of authority in this and other states holds to the doctrine that a mere volunteer is not entitled to the right of subrogation. The fact that money is fur-

3. nished to pay off existing liens, or for like purposes, on new security which afterwards proves to be defective or insufficient, is not a sufficient showing to give to such person the right of subrogation under the liens or claims so paid. If one not compelled so to do to protect some right or interest, voluntarily furnishes money to pay off a mortgage or other lien, without any fraud, mistake or misrepresentation inducing him so to do, and takes a new mortgage or other obligation as security, knowing that the old claim or lien is to be satisfied, and his security fails or proves defective, he is not entitled to be subrogated to the rights of the mortgagee or lien holder whose claim has been so paid, as against the rights of other persons holding valid liens upon the property. In such case the original debt is extinguished and equity will not keep the lien alive for the protection of one who has been free to contract, though he may through negligence or for other reasons, have obtained defective or valueless securities. This is especially true where the holders of valid claims must be disturbed in their legal rights if subrogation is granted. Where

there is no superior equity, or where the equities are

4. equal, subrogation can not be successfully invoked.

Richmond v. Marston (1860), 15 Ind. 134; *Spray v. Rodman* (1873), 43 Ind. 225; *McClure v. Andrews* (1879), 68 Ind. 97; *Muir v. Berkshire* (1875), 52 Ind. 149; *Nash v. Taylor* (1882), 83 Ind. 347, 351; *Edinburg, etc., Mortg. Co. v. Latham* (1882), 88 Ind. 88; *Sidener v. Pavey, supra*; *Johnson v. Barrett, supra*; *Spaulding v. Harvey, supra*; *Thompson v. Connecticut Mut. Life Ins. Co.* (1894), 139 Ind. 325, 346, 38 N. E. 796; *Shattuck v. Cox* (1891), 128 Ind. 293, 27 N. E. 609; *Davis v. Schlemmer* (1898), 150 Ind. 472, 478, 50 N. E. 373; *Warford v. Hankins* (1898), 150 Ind. 489, 50 N. E. 468.

The proposition mainly relied upon to support the

5. claim to the right of subrogation is that the holder of the judgment lien is not harmed thereby. This

6. is true, but on the other hand his judgment was of record and a person taking a new mortgage and knowing that the existing mortgage was to be paid and satisfied, is charged with notice of the fact that judgment and other liens may have attached to the property after the execution of the mortgage which was to be satisfied. The law compels knowledge of the fact that an outstanding judgment junior to an existing mortgage will become a first lien upon satisfaction of the mortgage and thus determines appellant's right to hold his senior lien, and if he can be deprived of such right, it must be by virtue of some superior equity.

All the parties to the transaction knew the money

7. was to be used to pay the bank. The original proposition involved a sale by the bank of its mortgage.

The change in the rate of interest may or may not have suggested the advisability of a new mortgage, but certainly it did not make it a necessity. The new mortgage was executed at the request of the mortgagee and he accepted it knowing the old one was to be satisfied. There was no ex-

press agreement that the old security should be kept alive for his benefit, and we can not imply such an agreement when he voluntarily elected to take a new mortgage and knew the old one was to be satisfied. He saw fit to secure his loan by a new mortgage, and got what he demanded. True, he believed he was obtaining a first lien upon the real estate, but this belief was not induced by any fraud or misrepresentation. If he did not get all he thought he was obtaining, it was due to his own negligence in failing to ascertain the existence of other liens upon the property covered by his mortgage. When we balance equities, the facts of this case show no superior equities in favor of the mortgagee as against appellant's rights. The mortgagee was a stranger to the transaction until he made the loan and his belief, under such circumstances, that he was obtaining a first mortgage, was only possible because of his own negligence. He failed to take the necessary precautions and employ the ordinary means to ascertain the character and value of his security. The mere fact that his money was loaned to pay an existing mortgage and the further fact that subrogation would not place appellant in a worse situation than he was in before the satisfaction of the bank's mortgage, are not sufficient to overcome his voluntary act in loaning the money, demanding and receiving a new mortgage, knowing the old one was to be released, and his negligence in failing to ascertain the existence of liens against the mortgaged property. We are aware that there are statements in the decisions to the effect that one who furnishes money to pay off an existing encumbrance on realty at the instance of either the owner of the property or the holder of the encumbrance, may by an express agreement be subrogated to the rights of the party holding the security so paid, and that in the absence of an express agreement to that effect, one will be implied where the facts and equities of the case warrant such implication. In either of such cases, the person is not regarded as a volunteer.

We find no case, however, that goes to the extent of granting such relief where the party has voluntarily elected to take a new mortgage when he could have obtained the original security and where he knew the old mortgage was to be satisfied and he negligently failed to ascertain the existence of other prior liens, and was not brought into such situation by any fraud, misrepresentation or excusable neglect. In *Heiney v. Lontz, supra*, Judge Hackney distinguished the three cases most relied upon in this State for the application of the doctrine of subrogation to volunteers in such transactions. The case of *Thompson v. Connecticut Mut. Life Ins. Co., supra*, is also cited to support this doctrine, but the court by Howard, J., said the right of subrogation could not be allowed if "there were no intervening equity, on account of which the lien of the first mortgage ought to be kept alive." The court, on page 344 of the opinion, points out the peculiar facts in that case which take it out of the operation of the general rule, and they were clearly sufficient for that purpose. The opinion adheres to the general rule, and after citing authority in support of it says: "The decisions of this State are to the same effect as to volunteers, and hold, substantially, that it is only in case where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, or in virtue of legal process, that equity, as a matter of course and without special agreement, substitutes him in the place of the creditor; and that, in the absence of an agreement to that effect, a stranger paying the debt of another, will not be subrogated to the creditor's rights. Payment by such stranger absolutely extinguishes the debt." In the case of *Warford v. Hankins, supra*, the claim was a purchase-money lien expressly reserved in the deed and the party to whom subrogation was granted took up the note on an express agreement with the makers that the note and lien securing the same should be held by her as security. The mortgage against which subrogation was granted, was

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given for preëxisting debts and would not cut off prior equities. The ground of subrogation was clear under all the authorities and the decision cites and approves the case of *Binford v. Adams, supra*, where subrogation was denied on a state of facts in all essentials similar to those of the case at bar. It is clear that if the facts do not warrant subrogation in favor of Marshall, the mortgagee, the appellee can not avail herself of benefits depending upon his right of subrogation. The case presents a peculiar situation as the claim for subrogation is here presented, not by the holder of the mortgage, but by the owner of the land who has assumed payment of the mortgage.

Our conclusion that there can be no subrogation as against the rights of appellant under his judgment makes it unnecessary for us to decide whether the appellee could avail herself of the benefits of such right if the facts warranted subrogation in favor of the mortgagee. The judgment is therefore reversed with instructions to the lower court to restate its conclusions of law in favor of appellant and to render judgment in accordance with such conclusion.

Hottel, C. J., Adams, P. J., and Lairy, Myers and Ibach, JJ., concur.

ON PETITION FOR REHEARING.

FELT, P. J.—On reexamination of the questions involved in this appeal, we are satisfied with the conclusions announced in the original opinion, but have concluded that the ends of justice may be better subserved by modifying the mandate of the original opinion and instead of directing that the conclusions of law be restated in favor of appellant, grant to him a new trial. It is therefore ordered that the trial court grant to appellant a new trial and that the mandate of the original opinion be and the same is modified accordingly.

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NOTE.—Reported in 99 N. E. 447; 101 N. E. 651. See, also, under (1) 38 Cyc. 1985; (2) 37 Cyc. 372, 375; (3) 37 Cyc. 468, 470; (4) 37 Cyc. 371; (5) 27 Cyc. 1435; 37 Cyc. 471. As to subrogation where one has furnished means for paying off old mortgage and himself taken new one, see 99 Am. St. 521. . On the question of the right to subrogation to lien of mortgage for money advanced to pay off the same on defective security, see 5 L. R. A. (N. S.) 838. On the right of one who advances money to another for purpose of redeeming from a sale under a mortgage to be subrogated to the lien of the mortgage, see 23 L. R. A. (N. S.) 190.

KIRKLIN v. CLARK.

[No. 7,965. Filed May 6, 1913.]

1. **RELEASE.**—*Reply to Answer of Release.*—*Sufficiency.*—Where the complaint proceeded on the theory that a certain sum was due plaintiff for services rendered upon an implied contract, upon which plaintiff had received certain credits, and the answer averred the payment of a certain sum which plaintiff accepted and for which she executed a receipt purporting to be in full settlement of all claims, a reply to such answer admitting the payment, but charging that so much of the receipt as purports to be in full settlement is fraudulent, was not insufficient on the theory that it is an attempt to rescind for fraud without returning the amount paid, since under her theory plaintiff had a right to give credit for the payment and sue for the balance, and she was not obliged to adopt the theory presented by the answer. p. 361.
2. **APPEAL.**—*Questions Reviewable.*—*Refusal of Instructions.*—An assignment of error in refusing to give a certain instruction cannot be considered, where such instruction neither appears in the record nor in appellant's brief. p. 362.
3. **APPEAL.**—*Review.*—*Answers to Interrogatories.*—*Evidence.*—The jury's answers to interrogatories will not be disturbed on appeal, where there was some evidence to sustain them. p. 362.
4. **TRIAL.**—*Answers to Interrogatories.*—*Right of Jury.*—The jury is not confined to the mere statement of the witnesses to reach conclusions with respect to the evidence, but may infer, from circumstances proven, the facts found in answer to interrogatories. p. 363.
5. **APPEAL.**—*Review.*—*Interrogatories to Jury.*—*Form.*—Where an interrogatory double in form is propounded, without objection, and answered, it does not necessarily follow that it must be disregarded on appeal. p. 364.

6. **APPEAL.—Review.—Evidence.—Verdict.**—A verdict will not be disturbed on appeal on the ground of insufficient evidence, if there is any evidence to support it. p. 364.
7. **WORK AND LABOR.—Implied Contracts.**—Where there was evidence tending to show that plaintiff was taken into defendant's family when she was a child nine years old, and that she lived there continuously until she was thirty-six, performing all sorts of labor about the house and in the fields at appellee's request, and that when plaintiff was eighteen years old both defendant and his wife promised to pay her well for her work if she would remain with them, it cannot be said that there is any presumption that plaintiff was to continue as a member of defendant's family, especially after she had reached the age of twenty-one, and the jury had a right to determine from such evidence that plaintiff was entitled to compensation for her services. pp. 364, 365.
8. **APPEAL.—Review.—Verdict.—Conflicting Evidence.**—A verdict will not be disturbed on appeal on conflicting evidence. p. 365.
9. **WORK AND LABOR.—Contracts.—Presumptions.**—Where the relation of parent and child did not exist between plaintiff and defendant, and plaintiff could not inherit any of defendant's property upon his death, the presumptions indulged with reference to the relations between parent and child cannot prevail as against plaintiff's contention that she was to be paid for her services. p. 366.
10. **APPEAL.—Review.—Exclusion of Evidence.**—The court on appeal cannot say that the exclusion of evidence was erroneous, where no specific or vital objections are pointed out in appellant's brief. p. 366.

From Daviess Circuit Court; *Milton S. Hastings*, Special Judge.

Action by Ellen F. Clark against James J. Kirklin. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

J. B. Marshall, Hiram McCormick and T. D. Slimp, for appellant.

Frank E. Gilkison and Mattingly & Myers, for appellee.

SHEA, J.—This was an action by appellee against appellant to recover for services alleged to have been rendered by her for him at his special instance and request from March, 1883, to July, 1909. The complaint alleges, in substance, that appellee, at appellant's special instance and request performed work and labor for him in and about his

house and farm from March, 1883, to July, 1909, a period of 1,368 weeks, which services were worth \$2 per week over and above her board and clothing; that appellant has paid her \$40, and there is still due and owing her \$2,696, for which judgment is demanded. Appellant answered in three paragraphs; first, general denial. The second avers that appellee came to appellant's home when she was a small child, and was reared as a member of his family. After she reached the age of twenty-one years, she continued to remain there at her own instance and election until July, 1909; that there was never any agreement, express or implied, whereby he was to pay her for her services. The third paragraph is substantially as the second, except that it avers a settlement of the claim and sets out a receipt claimed to have been signed by appellee, which reads as follows:

"Shoals, Ind., Sept. 18, 1909.

Received from James J. Kirklin and Mary Kirklin
the sum of \$50.00 in full of all claim or right of action
for services rendered or promise for service rendered.
Ellen F. Clark."

Appellee's demurrer to the second and third paragraphs of answer was overruled and she then filed a reply in general denial to the second, and two paragraphs of reply to the third: (1) general denial; (2) that she met appellant's wife at Shoals, Indiana, who gave her \$25, and bought her a new hat costing \$3; that the money was given her and she accepted it as part payment on her claim against appellant; that she signed her name as best she could to a piece of paper containing some writing which she believed to be a receipt; that she could not read or write except to imperfectly write her name; that she had previously been discharged from appellant's service, and was at work at the town of Williams, twenty-five miles away when she was called by telephone to Shoals by appellant's wife, where she was told by appellant's wife that she wanted to pay her \$25.00 on her claim; that she would pay her more when

they sold the farm and they did not want appellee to sue them; that appellant's wife falsely and fraudulently told appellee that she had a receipt for the \$25 which she desired appellee to sign; that relying on the statements, and believing them to be true, appellee did sign said paper; that the statements made by appellant's wife were falsely and deceitfully made for the purpose and with the fraudulent intent to deceive and induce appellee to sign the paper, which was in fact a receipt for \$50, and a contract in full settlement of appellee's right of action and claim for services performed by her for appellant. She prays that the same be held for naught. Appellant's demurrer to the second paragraph of appellee's reply was overruled. The issues formed were tried by jury. Appellant's motion for a peremptory instruction directing a verdict in his favor was overruled. With its general verdict in favor of appellee, the jury returned answers to twenty-four interrogatories. Judgment on the verdict for \$1,438.

Appellant assigns error of the court in overruling his demurrer to the second paragraph of appellee's reply to the third paragraph of answer; and in overruling his motion for judgment on the answers to interrogatories notwithstanding the general verdict; his motion for peremptory instruction, and his motion for a new trial. The brief in this case is subject to criticism, but there is sufficient compliance with the rules to determine the questions hereinafter stated.

The first error assigned is the overruling of the demurrer to the second paragraph of reply to the third paragraph of appellant's answer. The theory of the complaint is that there was a certain sum due appellee from appellant for services rendered upon an implied contract, upon which she had received certain credits, among others the sum of \$25 cash paid her by appellant's wife. The theory of the third paragraph of answer is that appellant paid and appellee accepted \$25 and certain articles in full settlement of her claim, and executed a written receipt

signed by her for \$50, purporting to be in full settlement of all claims, which is made a part of the third paragraph of answer. The second paragraph of reply admits the payment of \$25, but charges that so much of the alleged receipt as claims to be in full settlement, is fraudulent. Appellant insists in behalf of his demurrer that this is an effort to rescind the contract for fraud, without returning the amount paid. Many authorities are cited which uphold appellant's theory, but they have no application to the question here involved. Appellee had a right, by her theory, to give credit for the \$25 as a partial payment and sue for the remainder claimed to be due. She was not obliged to adopt the theory of the case urged by appellant. *Home Ins. Co. v. Howard* (1887), 111 Ind. 544, 13 N. E. 103.

Error is next assigned upon the refusal of the

2. trial court to peremptorily instruct the jury to return a verdict for appellant. This instruction is neither set out in the brief, nor does it appear in the record. Under Rule 22 and many decisions of this as well as the Supreme Court, this assignment can not be considered. The record discloses a motion for a peremptory instruction, but the instruction does not appear. It is also urged that the court erred in overruling appellant's motion for judgment in his favor upon the answers to interrogatories, notwithstanding the general verdict. There is no conflict between the general verdict and the answers to interrogatories, in fact, the answers go very far to disclose the motives which prompted the jury in reaching the general verdict. The objections urged thereto go rather to the sufficiency of the evidence to sustain the answers to the interrogatories. An

examination of the record discloses that there was

3. some evidence to sustain every answer made by the jury. Under the well-known rule, this court will not disturb answers to interrogatories where there was evidence from which the jury might have reached such con-

clusions. *Perry, etc., Stone Co. v. Wilson* (1903), 160 Ind. 435, 67 N. E. 183.

The jury was not confined to the mere statement
4. of witnesses to reach conclusions with respect to the evidence, but might infer from circumstances proven, the facts found in answer to interrogatories. The jury found, in substance, as follows: When about nine years of age, appellee went to appellant's home to live, and she had no other home until she left in 1909. She lived in the same house with appellant's family, ate at the same table, and she and appellant's wife prepared the meals, did milking, churning, washing and other housework. Appellee kept no account or memorandum of the work she did, nor of the articles of clothing furnished her, and at no time asked appellant to pay her, or made any claim that he owed her wages. She made no such claim at the time she left appellant's home in 1909, nor at any time before bringing suit, neither did she present appellant with a statement or account of her services. Appellee attended school a part of the time she lived with appellant, but could not read or write. After she became twenty-one years old, she told appellant that she expected pay for her work, and did not, after arriving at that age, continue of her own will to live with appellant. After leaving his home, appellant learned that appellee was threatening him with a lawsuit, and sent his wife to see her and try to compromise it. Appellee met appellant's wife, but the latter did not tell her that she and her husband were getting old and wished to avoid a lawsuit therefore they would rather give her something to compromise; that they talked over the threatened suit, but a typewritten article (the receipt set out in appellant's third paragraph of answer) was not read to her by J. B. Marshall, and appellee did not sign said instrument after it was read to her, neither did appellant's wife, in the office of J. B. Marshall, pay her \$25 in compromise of any claim or pretended claim she then had against appellant.

Interrogatories Nos. 22 and 23 are drawn in such

5. a manner as might have a tendency to confuse the jury. On proper motion they should have been modified. As they stand, this court cannot find that the jury was not warranted in reaching the conclusions set out. These interrogatories and answers thereto are as follows: "22. When plaintiff and defendant's wife met and talked over the question of a threatened lawsuit against defendant, was there a typewritten article, in words and figures following read by J. B. Marshall to plaintiff: 'Shoals, Ind., Sept. 18th, 1909. Received from James J. Kirklin and Mary Kirklin the sum of \$50.00 in full of all claim or right of action for services rendered or promise for service rendered. Ellen F. Clark'? A. No. 23. Did the plaintiff sign said instrument in writing and deliver it to defendant's wife, after the same was read to her? A. No." It has been held that where an interrogatory double in form is propounded, without objection, and answered, it does not necessarily follow that it must be disregarded on appeal. *Van Hook v. Young* (1902), 29 Ind. App. 471, 64 N. E. 670.

Under his motion for a new trial appellant as-

6. signs that the verdict is not sustained by sufficient evidence and is contrary to law. As stated above, there is some evidence to support the verdict. On some points it may be held to be meager, yet this court cannot disturb the verdict if there is any evidence to support it.

The evidence tends to show that appellee in this case

7. was taken into appellant's family when she was a child nine years old, and lived there continuously until she was thirty-six, performing all sorts of labor about the house, as well as in the fields, all at appellant's request. Some of the evidence tends to show very strongly that she was required to and did do a man's work in the fields. The jury had a right to believe this evidence, although it is very strongly assailed by appellant. It cannot be said there was a presumption indulged that she was to continue to

live as a member of the family after she had reached the age of twenty-one, especially, and the jury had a right to determine from the evidence in this case that she believed, expected, and was entitled to compensation for her services. *Eppert v. Gardner* (1911), 48 Ind. App. 188, 93 N. E. 550. Appellee testified as follows: "She (meaning appellant's wife) said if I would stay there and work for them they would pay me well for my work." Appellee at that time was eighteen years old. No amount was agreed upon or stated. Appellee also testified: "Well, he (meaning appellant) was talking and said if I would stay there and work for them, they would pay me well for my work." There is much conflict in the evidence, but that was a mat-

8. ter wholly for the jury, and this court can not disturb a verdict on conflicting evidence. In the case
7. of *Eppert v. Gardner, supra*, the court quotes the following language from *Crampton v. Logan* (1902), 28 Ind. App. 405, 408, 63 N. E. 501: "And if the circumstances authorized the person rendering the services reasonably to expect payment therefor, by way of furtherance of the intention of the parties, or because reason and justice require compensation, the law will imply a contract therefor." It is further said on page 193: "There is some evidence tending to prove a contract between appellee and her father; at least enough to rebut the presumption that the services were rendered by her gratuitously, and the rule is well settled that where it is the province of the jury to decide questions of fact, that decision will not be disturbed, if there is any evidence presented to sustain the verdict." See, also, *Wallace v. Long* (1886), 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; *Story v. Story* (1891), 1 Ind. App. 284, 27 N. E. 572; *Knight v. Knight* (1893), 6 Ind. App. 268, 33 N. E. 456; *Forester v. Forester* (1894), 10 Ind. App. 680, 38 N. E. 426; *Miller v. Miller* (1911), 47 Ind. App. 239, 94 N. E. 243. Although appellee had been a member of appellant's household from the time she was nine

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years old, yet the relation of parent and child did
9. not exist. She could not inherit any of appellant's property upon his death, and therefore any presumptions that might be indulged with reference to the relations between a child and parent can not prevail in this case.

Objection is made to the admission of certain evi-
10. dence. No specific or vital objections are pointed out in appellant's brief to the admission of this evidence, and we can not say from the record that error was committed in admitting it. *Franklin v. Lee* (1902), 30 Ind. App. 31, 62 N. E. 78; *Baltimore, etc., R. Co. v. Daegling* (1902), 30 Ind. App. 180, 65 N. E. 761.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 753. See, also, under (1) 34 Cyc. 1097; (2) 3 Cyc. 170; (3, 6) 3 Cyc. 348; (4) 38 Cyc. 1517; (5) 38 Cyc. 1916, 1932; (7) 40 Cyc. 2845; (8) 3 Cyc. 349; (10) 2 Cyc. 1014, 1015. As to presumption that services rendered by relative are gratuitous see 133 Am. St. 250. On the question of the implication of an agreement to pay for services rendered by relative or member of household, see 11 L. R. A. (N. S.) 873.

TERRE HAUTE, INDIANAPOLIS AND EASTERN TRACTION COMPANY v. LATHAM.

[No. 7,971. Filed May 7, 1913.]

1. RAILROADS.—*Interurban.—Injuries to Persons on Tracks.—Issues of Fact.—Submission to Jury.*—In an action against an interurban railroad company on the theory that plaintiff's horse became unmanageable and ran upon the track, that because of the fright of the horse and the defective condition of the track he was unable to control the horse and escape from the track, and that the collision was caused either by the motorman's failure to use ordinary care to prevent the injury after plaintiff was exposed to the danger, or by the excessive and dangerous speed of the car, and the theory of the defense was that there was not sufficient time to stop the car after plaintiff got upon the track, that plaintiff's failure to escape from the track was not due to any defects therein, and that the collision was not due to the excessive speed

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of the car, it was the court's duty to submit the questions of fact to the jury for its decision. p. 369.

2. **RAILROADS.—*Tracks in Highway.—Duty to Restore and Maintain Highway in Condition.***—Where a railroad company has constructed its track in a highway, it must restore the highway to a reasonable condition of safety and convenience in view of the new use to which it has been appropriated, and must thereafter use reasonable care to maintain it in such condition, but the company is not an insurer against all defects, and is not required to go beyond the exercise of proper care and skill under the circumstances to prevent injury to the person or property of others. p. 369.
3. **RAILROADS.—*Tracks in Highway.—Duty to Restore and Maintain Highway in Condition.—Instructions.***—An instruction that the law requires a railway company to construct and maintain its tracks so that the public may use the highway with reasonable safety, that the company is liable for injuries proximately resulting from failure so to do, and that whether a particular highway is reasonably safe for public travel is a question for the jury under all the conditions and circumstances of the particular case, is erroneous in imposing upon defendant the absolute duty to maintain the highway in a condition reasonably safe for use, and in failing to submit the further question of whether the defects, if the jury found the highway unsafe, were due to a want of care and skill on the part of defendant. p. 370.
4. **RAILROADS.—*Injury to Persons on Tracks.—Last Clear Chance.—Instructions.***—Where the negligence of plaintiff continues up to the time of the injury and concurs with that of defendant in producing the injury, the doctrine of last clear chance is not applicable, so that, in an action for injuries in being struck by an interurban car while driving upon defendant's track, an instruction was erroneous which stated that even if plaintiff was guilty of negligence in driving upon the track, he may nevertheless recover, if the motorman by the exercise of ordinary care could have discovered his peril and avoided the collision. p. 370.
5. **RAILROADS.—*Injury to Persons on Tracks.—Last Clear Chance.***—The doctrine of last clear chance is applicable in the case of one who was struck by an interurban car while driving upon defendant's track, although he got upon the track through his own negligence, if, by reason of defects in the street, for which defendant was responsible, and the frightened condition of plaintiff's horse, plaintiff was unable, by the exercise of due care, to extricate himself from the danger in time to avoid the injury, and if by the exercise of due care by defendant the injury could have been prevented. p. 371.
6. **APPEAL.—*Review.—Presumptions.—Prejudicial Error.***—The pre-

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sumption is in favor of the judgment of the trial court and appellant has the burden of showing material error, and when such error is shown it will be presumed to have been prejudicial unless the contrary affirmatively appears from the record. p.371.

From Putnam Circuit Court; *John M. Rawley*, Judge.

Action by Oscar Latham against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Thomas T. Moore, A. W. Knight and McNutt, Wallace & Sanders, for appellant.

S. A. Hays and Thomas W. Hutchison, for appellee.

LARRY, J.—Appellee recovered a judgment for damages resulting from personal injuries which he received in a collision with one of appellant's interurban cars. For some distance east of the city of Brazil, Indiana, appellant maintained its tracks and operated its cars along the centre of a highway known as the National Road. At the time appellee received his injury he was on this highway just east of the city limits of Brazil and was riding in a buggy drawn by a single horse. He was going east and the car which collided with his buggy and caused his injury approached from the rear. The case went to trial upon two paragraphs of complaint. The first paragraph charged that appellant was negligent in the particulars, following: first, that appellant ran and operated its car at a high and dangerous rate of speed; second, that appellant negligently constructed and maintained its tracks in the highway with the rails six inches above the traveled part of the road; third, that appellant's motorman negligently failed to apply the brakes to the car after he discovered the danger to appellee. The third paragraph proceeds upon the theory that appellee was in a dangerous situation on the tracks of appellant from which he was unable to escape by the exercise of care on his part, and that the motorman of appellant, after discovering his peril, or after he should have

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discovered it by the exercise of ordinary care, negligently failed to prevent the collision.

The only ground relied on for reversal is the action of the court in overruling appellant's motion for a new trial. The specific errors assigned as grounds for a new trial are

. the giving of certain instructions. The theory of

1. appellee was that his horse became frightened and unmanageable and ran upon the tracks of appellant, and that, by reason of the fright of the horse and the defective condition of the tracks he was unable to control the horse and drive the buggy off of the tracks. According to the theory of appellee, the collision was caused either by the failure of the motorman to exercise ordinary care to prevent the collision after appellee was exposed to the danger, or on account of the excessive and dangerous rate of speed at which the car was being operated. Appellant defended upon the theory, first, that there was not sufficient time to stop the car after appellee got upon the track, second, that the failure of appellee to escape from the track before he was struck was not due to the defective condition of the track, and, third, that the collision was not due to the excessive speed of the car. It was the duty of the court to submit the questions of fact to the jury for its decision. Under our statute it was the duty of

2. appellant after constructing its track, to restore the highway to a reasonable condition of safety and convenience in view of the new use to which it had been appropriated, and thereafter, it was appellant's duty to exercise reasonable care to maintain it in such condition. It can not be said, however, that the duty is of such an absolute character as to make the company an insurer against all defects. The company is required to use proper care and skill under the circumstances to prevent injury to the person or property of others, but beyond this it is not required to go. *Cleveland, etc., R. Co. v. Wisheart* (1903), 161 Ind.

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208, 67 N. E. 993; *Terre Haute, etc., R. Co. v. Clem* (1890), 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. 303; *Evansville, etc., R. Co. v. Crist* (1889), 116 Ind. 446, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. 865.

Instruction No. 7 is as follows: "The law requires

3. railway companies to construct and maintain their tracks so that the public who travel thereon may be enabled to use the highway with reasonable safety and they become liable for all injuries resulting as a proximate consequence of a failure on their part to comply with their duty in that behalf. Whether any particular highway is reasonably safe for public travel is a question for the jury under all conditions and circumstances of the particular case." Under this instruction the only question submitted to the jury was whether the highway was in a reasonably safe condition for travel. If the jury found that it was in an unsafe condition for travel, the further question should have been submitted, whether such unsafe condition was due to a want of care and skill on the part of appellant in maintaining the highway in reference to its tracks. The instruction imposes the absolute duty on appellant to maintain the highway with reference to its tracks in such a condition as to be reasonably safe for use, whereas the law exacts only reasonable care and skill in this regard. The instruction was therefore erroneous.

Instruction No. 16 is erroneous. This instruction

4. is based upon the doctrine of last clear chance. It tells the jury in substance that even if appellee was guilty of negligence in driving upon the track, he may nevertheless recover, if the motorman by the exercise of ordinary care could have discovered his peril and avoided the collision. It is clear that if appellee negligently entered upon the track, he would not be excused from exercising care for his own safety after that time and before the collision. If he had an opportunity to get off the track and avoid the injury, it was his duty to do so. If his

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negligence continued up to the very time of the injury and concurred with that of appellant in producing it, there is no room for the application of the doctrine of last clear chance. *Indianapolis Traction, etc., Co. v. Croly* (1913), 54

Ind. App. —, 96 N. E. 973. If by reason of the de-

5. facts in the street and the frightened condition of the horse, plaintiff was unable, by the exercise of due care, to extricate himself from the danger in time to avoid the injury, and if appellant's motorman by the exercise of due care could have prevented the injury and failed to do so, this would give room for the application of the doctrine of last clear chance; but under this instruction the jury is not required to find such a state of facts before applying the doctrine. This instruction would justify a verdict in favor of the plaintiff even though he was negligent in entering upon the track, and even though his negligence continued up to the accident and concurred in producing it.

Appellant also points out objections to instructions Nos. 9, 10, 14, 18 and 19. We have examined these instructions and find that, with the exception of instruction No. 10, they are open to some of the objections urged against them. It would unnecessarily extend this opinion to discuss each of these instructions separately. The objections have been pointed out in appellant's brief, and we have no reason to believe that they will not be avoided in another trial of the case.

Counsel for appellee do not seriously contend that the instructions properly state the law, but it is insisted that the errors complained of did not affect the substantial rights of the litigants and that the judgment should be affirmed notwithstanding the erroneous instructions. If we were in a position to say that the erroneous instructions did not affect the result we would not hesitate to affirm the case,

but the record does not show affirmatively that the

6. errors pointed out did not affect the verdict. The presumption is in favor of the judgment of the trial

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court and the burden is upon appellant to point out a material error; but, when a material error is pointed out, it is presumed to have been prejudicial unless the record shows affirmatively that it did not affect the result. In a recent decision the Supreme Court states the rule thus: "As a general rule, where it is shown in a case on appeal to this court that the trial court committed a material error in some ruling, either in giving instructions or otherwise, we must presume that such erroneous ruling was prejudicial to the party complaining in respect thereto, unless it affirmatively appears in some manner from the record that the ruling was harmless, and the burden is not upon the party claiming to be aggrieved thereby to show that he was prejudiced by the erroneous ruling, but the burden rests upon the opposite party to show by the record in the case that the party complaining was not harmed thereby." *Cleveland, etc., R. Co. v. Case* (1910), 174 Ind. 369, 376, 91 N. E. 238.

The judgment is reversed with directions to sustain defendant's motion for a new trial, and for other proceedings not inconsistent with this opinion.

NOTE.—Reported in 101 N. E. 746. See also, under (1) 33 Cyc. 896; (2) 33 Cyc. 236; (4) 33 Cyc. 854; (6) 3 Cyc. 275, 386. As to obligations of street railway company to municipality in respect of care of streets occupied for roadbed, see note to *Western P. & S. Co. v. Street Railroad Co.* (Ind.), 25 Am. St. 475. As to street car collisions with vehicles or horses, generally, see 25 L. R. A. 508. As to frightening of horse by street car, see 34 L. R. A. 486; 21 L. R. A. (N. S.) 288. On the question whether wantonness or wilfulness, precluding defense of contributory negligence, may be predicated on the omission of a duty before the discovery of a person in peril on a railroad or street railway track, see 21 L. R. A. (N. S.) 427. For a discussion of the duty and liability of a street railway as to vehicles moving along its tracks, see 7 Ann. Cas. 1127, 18 Ann. Cas. 510.

PETERSON v. DOWNEY.

[No. 7,969. Filed May 7, 1913.]

1. **APPEAL.—Review.—Judgment by Default.**—While §405 Burns 1908, §396 R. S. 1881, makes it the imperative duty of the trial court to set aside a judgment by default for the mistake, inadvertence, surprise or excusable neglect of the party against whom it was taken, it is for the court to determine from the evidence whether a sufficient showing has been made, and where the evidence conflicts, the court's action on the application to vacate will not be disturbed on appeal. p. 374.
2. **APPEAL.—Review.—Application to Vacate Judgment by Default.—Evidence.**—That all the evidence upon an application to vacate a judgment by default was by affidavit does not change the rule that the determination of the trial court will not be reviewed where the evidence is conflicting, since such affidavits are not documentary evidence the force and effect of which the court is compelled to construe on appeal. p. 375.

From Lake Circuit Court; *Willis C. McMahan*, Judge.

Application by John Peterson to be relieved from a judgment taken by default in favor of Henry P. Downey. From a judgment denying the application, the applicant appeals. *Affirmed.*

McMahon & Conroy, for appellant.

Frank B. Pattee, for appellee.

HOTTEL, J.—This is an appeal from a decision of the Lake Circuit Court, rendered on an application to be relieved from a judgment taken by default.

The record discloses that the original complaint in the action in which such judgment was taken was filed in said court, May 6, 1908, and on the same day appellant was served with a summons to appear and answer such complaint May 25, 1908. At the September term of such court, to wit: September 8, 1908, the appellant appeared by his attorney, L. T. Meyer, and filed a motion to make the complaint more specific. During the same term, to wit, on Sept. 23, 1908, appellant filed his affidavit for a change of venue from Lake County where said cause was then pend-

ing, and said cause was venued to the Porter Circuit Court. At the October term, 1909, of the Porter Circuit Court, to wit: on Oct. 26, 1909, said cause was certified back to the Lake Circuit Court as per stipulation of the attorneys for appellant and appellee set out in the record. At the February term, 1910, of the Lake Circuit Court, to wit: on March 11, 1910, the appellee filed an amended complaint. At the April term of said court, to wit: on April 26, 1910, the court ordered that the appellant file his answer to such complaint on or before April 29, 1910, and on May 4, following, and during such April term, such court, because of the failure of appellant to answer the appellee's amended complaint in compliance with its said order, found that the appellee was "entitled to judgment against appellant *pro confesso* as upon a default" and said cause was submitted to the court for hearing and trial and judgment rendered in appellee's favor. On September 6, 1910, and during the September term, of said court, the appellant filed his verified petition to set aside the default, and open up and vacate the judgment, and supported it by an affidavit of one of his attorneys. To this petition counter-affidavits were filed and the petition overruled, from which ruling this appeal is prosecuted.

It is claimed by appellee that on account of some alleged omissions and irregularities in the appellant's bill of exceptions, no question is presented to this court and that for this reason the judgment should be affirmed. We deem it unnecessary to consider this question for the reason that a careful examination of the record convinces us that the

judgment should be affirmed on its merits. While

1. the section of statute on which appellant's petition is based, viz., §405 Burns 1908, §396 R. S. 1881, makes it the imperative duty of the trial court to set aside a judgment by default for the mistake, inadvertence, surprise or excusable neglect of the party against whom it was taken, "yet whether or not such mistake, inadvertence, sur-

prise or excusable neglect has been shown is a question for the determination of the court from all the evidence given for or against the application, and where such evidence is conflicting, it will not be weighed on appeal and the judgment of the lower court will be sustained as in all other cases of conflicting evidence.” Nor does the fact

2. that all of the evidence given upon such question was by affidavit, change this rule, because by the repeated holdings such affidavits are not “regarded as documentary evidence, the force and effect of which is to be construed by the court on appeal, but they are regarded in the nature of depositions and the rules for weighing parol testimony are applied.” *Wells v. Bradley, Holton & Co.* (1892), 3 Ind. App. 278, 280, 29 N. E. 572, and authorities there cited.

It is open to question whether appellant by the affidavits accompanying his petition shows a sufficient excuse for the continued delay and lack of attention given to his case, evidenced by the record, but in any event, when this showing is considered in connection with the counter-affidavits, we are convinced that the decision of the trial court on such application was not only supported by some evidence, but that it was clearly right on the evidence and in accord with the decisions of the Supreme Court and this court. *Wells v. Bradley, Holton & Co., supra*; *Parkinson v. Thompson* (1905), 164 Ind. 609, 625, 73 N. E. 109, 3 Ann. Cas. 677; *Hoag v. Old People's Mut., etc., Soc.* (1891), 1 Ind. App. 28, 33, 27 N. E. 438; *Schofield v. Starnes* (1892), 5 Ind. App. 457, 458, 32 N. E. 590; *Moore v. Horner* (1896), 146 Ind. 287, 45 N. E. 341, and authorities cited.

Judgment is therefore affirmed.

NOTE.—Reported in 101 N. E. 737. See, also, under (1) 3 Cyc. 366; (2) 3 Cyc. 377. As to what measure or sort of negligence or mistake by defendant in suffering judgment to be taken against him entitles him to have the judgment vacated, see 96 Am. St. 109. As to statutes authorizing vacation and setting aside of default judgments, see 58 Am. Dec. 392.

MASSON v. INDIANA LIGHTING FIXTURE COMPANY
ET AL.

[No. 7,830. Filed February 18, 1913. Rehearing denied May 7, 1913.]

1. **APPEAL.—Waiver of Error.—Briefs.**—Errors assigned are waived by appellant's failure to discuss them in his brief or cite authority to support same. p. 377.
2. **APPEAL.—Questions Presented.—Record.**—Where the transcript of the evidence is not in the record, the specification in the motion for new trial, that the decision of the court is contrary to law, presents the same question as that raised by appellant's exceptions to the conclusions of law. p. 379.
3. **APPEAL.—Review.—Exceptions to Conclusions of Law.—Admissions.**—Appellant's exceptions to the conclusions of law concede, for the purpose of such exceptions, that the facts are fully and correctly found. p. 379.
4. **APPEAL.—Review.—Findings.—Waiver of Lien.**—Special findings showing that no definite time was agreed upon within which defendant was to pay for fixtures furnished by plaintiff and that defendant was given an indefinite time to make payment do not evidence a contract giving defendant the right to fix the time of payment beyond the period within which plaintiff might file a mechanic's lien, and do not show a waiver of plaintiff's right to file and enforce such lien. pp. 379, 380.
5. **MECHANICS' LIENS.—Waiver.**—A person may by express contract waive his right to hold and enforce a mechanic's lien, and such waiver may be inferred or implied from a course of dealing or acts evidencing a clear intention so to do. p. 380.
6. **MECHANICS' LIENS.—Waiver.—Evidence.**—The extension of the time for payment of a claim, for which a lien may be had, beyond the period for acquiring such lien, is a circumstance that may be considered on the subject of waiver, but is not conclusive. p. 380.
7. **MECHANICS' LIENS.—Waiver.—Evidence.**—An extension of the time of payment beyond the time within which a lien may be enforced clearly shows an intention to waive the lien. p. 380.
8. **TENDER.—Sufficiency.—Conditional Offer to Pay.**—An offer to pay the amount due on a mortgage or other lien, on condition that such lien shall be satisfied and released of record before the money is surrendered, is insufficient to operate as a tender. p. 381.

From Marion Circuit Court (18,750); *Charles Remster*, Judge.

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Action by the Indiana Lighting Fixture Company and others against Woodburn Masson. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

V. G. Clifford and *Woodburn Masson*, for appellant.

Merle N. A. Walker and *John E. Hollett*, for appellees.

FELT, P. J.—This is a suit by the appellee against the appellant to foreclose a mechanic's lien on certain real estate in the city of Indianapolis. Upon request the court made a special finding of facts and stated its conclusions of law thereon. Appellant filed a motion for new trial which was overruled. Judgment was rendered for appellee on the conclusions of law, to which appellant excepted, and prayed this appeal.

Errors assigned are: the sustaining of appellee's

1. demurrer to appellant's plea in abatement and the overruling of appellant's demurrer to appellee's complaint. Appellant has not discussed these alleged errors, nor cited authority to support the assignments. Under well-established rules, such errors, if any, are therefore, waived. Error is also assigned on the court's conclusions of law and the overruling of the motion for a new trial.

The finding of facts so far as material to the questions presented is in substance as follows: that appellant owned the real estate in question on which he erected a dwelling house between February 23, 1909, and July 25 of that year; that appellee is a corporation organized under the laws of the State of Indiana, and engaged in the sale and installment of chandeliers and lighting fixtures; that appellee entered into a verbal contract with appellant to sell, furnish and install in said dwelling certain chandeliers and lighting fixtures for which he agreed to pay the sum of \$150; that appellee furnished and installed in said dwelling house the chandeliers and fixtures so purchased and in addition thereto at appellant's request, certain other lighting fixtures of the value of \$4; that the work of installing

said fixtures was completed on July 16, 1909, and thereupon a statement of the amount due therefor was furnished appellant; that when said contract for the purchase of said fixtures as aforesaid was made, the time in which appellant was to pay for the same "was not definitely fixed by the terms thereof but an indefinite time was given said defendant, Woodburn Masson in which to pay for the same"; that on August 11, 1909, appellee demanded payment of said bill and received thereon the sum of \$50; that in the latter part of said month appellee demanded payment of the balance due on said bill and was then informed by appellant that he had been given an indefinite time in which to pay said bill and had decided to pay the same in three installments of \$50 each, the second of which he would pay on September 11, and the third of October 11, 1909; that thereupon appellee informed appellant that unless the entire amount was paid by September 14, 1909, it would file a notice of its intention to hold a lien on said real estate for the unpaid balance of said bill; that on September 11, 1909, appellee demanded payment of said account and appellant said he would pay the sum of \$50 thereon and that that amount was all there was then due; that thereupon appellee again informed appellant that unless said bill was paid in full on or before September 14, 1909, notice of a mechanics' lien therefor would be filed; that thereupon appellant refused to make any further payment at that time and has not since paid any part of said balance; that on September 14, 1909, appellee filed its notice of intention to hold a mechanic's lien on said real estate and dwelling house, and the same was duly recorded in the office of the recorder of Marion County, Indiana; that on October 11, 1909, appellee's attorney demanded of appellant payment of the balance due on said bill and was by him informed that he was ready to give his check for the sum of \$104, provided said attorney would first procure the release and satisfaction of said lien, which proposition was refused and no payment

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was then made; that this suit was commenced on February 3, 1910; that a reasonable fee for appellee's attorney is \$25; that there was due and unpaid on said bill at the time said suit was commenced the sum of \$104. On the foregoing facts the court stated its conclusions of law, that appellant was indebted to appellee in the sum of \$104 with interest thereon at the rate of six per cent per annum from October 11, 1909, on account of material furnished and labor performed, in the erection of the dwelling house situate on said real estate; that appellee holds a valid lien on said real estate to secure the payment of said amount and that there is due the sum of \$133.18.

There is no transcript of the evidence in the record

2. and the only available ground stated in appellant's motion for new trial, is that the decision of the court is contrary to law. On the record presented this question is the same as that raised by the exceptions to the conclusions of law.

Appellant contends that under the agreement between him and the appellee, he had the right to fix the time of payment for the fixtures, provided the same was fixed within reasonable limits; that by this agreement he had the right to extend the time of payment beyond the period within which appellee might file a lien, and that by virtue thereof appellee waived its right to a lien. Appellant's ex-

3. ceptions to the conclusions of law concede for the purpose of such exceptions that the facts are fully and correctly found. The first question, therefore, to be determined is, Do the facts found by the court evi-

4. dence a contract which gave to appellant the right to fix the time of payment beyond the period within which appellee might file a mechanic's lien and show a waiver of appellee's right to file and enforce such lien? The findings simply show that no time of payment was agreed upon by the parties and that appellant was given an indefinite time in which to make payment. They do not show

that the parties mutually entered into an arrangement that would authorize appellant to make payments in three separate installments on dates to be arbitrarily designated by him. Furthermore, if the dates for payments had been mutually agreed upon as designated by appellant, such facts would not amount to more than evidence tending to show a waiver.

A person may by express contract waive his right

5. to hold and enforce a mechanic's lien. Such waiver may also be inferred or implied from a course of dealing or acts evidencing a clear intention so to do. The

extension of the time for payment of a claim, for
6. which a lien may be filed, beyond the period for acquiring such lien, is a circumstance that may be considered on the subject of waiver, but is not conclusive.

To show such waiver, the intention to waive the lien must be clearly established. Under our statute the notice must be filed within sixty days from the date of furnishing the last item for which a charge may legally be made in the bill for which the lien is filed, but the lien may be enforced at any time within one year from the date of the filing and recording of such notice. An extension of the time of payment beyond the time within which the lien could be

7. enforced would clearly show an intention to waive the lien. 27 Cyc. 261, *et seq*; 20 Am. and Eng. Ency. Law (2d ed.) 361, 362, 493; *Blakely v. Moshier* (1892), 94 Mich. 299, 54 N. W. 54, 55; *Davis v. La Crosse Hospital Assn.* (1904), 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 950; *Mehan v. Thompson* (1880), 71 Me. 492; *Clark v. Huey* (1895), 12 Ind. App. 224, 234, 235, 40 N. E. 152; *Rhodes v. Webb-Jameson Co.* (1898), 19 Ind. App. 195, 197, 198, 49 N. E. 283; *Elwood State Bank v. Mock* (1907), 40 Ind. App. 685, 687, 82 N. E. 1003; *Teal v. Spangler* (1880), 72

Ind. 380. Applying these principles to the facts

4. found in this case it is clear that they fail to show any intention on the part of appellee to waive the

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right to enforce a lien against appellant's property. Neither do the facts evidence any agreement to waive the lien, nor authorize any such inference.

The court did not therefore err in its conclusion of law that appellee acquired and is entitled to enforce a mechanic's lien against the property described in the complaint. This conclusion renders it unnecessary to consider the other questions discussed in the briefs. Judgment affirmed.

ON PETITION FOR REHEARING.

FELT, P. J.—In his petition for rehearing appellant insists that he offered to pay the amount due appellee before this suit was begun and that appellee refused to accept payment unless he would first dismiss another suit he had brought against it. He says the original opinion “virtually holds” that his refusal to accede to the demand of appellee for such dismissal affords the reason for affirming the judgment of the lower court. Conceding, but not deciding, that the finding that appellant “was ready and willing” to give his check for the amount due, if unmodified, would show a good tender, the condition imposed by appellant, and not the subsequent condition mentioned by appellee's attorney, prevented the offer to pay, or tender, from being effective as a bar to appellee's right of foreclosure. The finding shows that appellant offered to give his check “provided that said attorney would first procure the release” and satisfaction of said lien. An offer to pay the amount due on a

8. mortgage or other lien, on condition that such lien be satisfied and released of record before the money is surrendered, is insufficient to operate as a tender. *Storey v. Krewson* (1877), 55 Ind. 397, 23 Am. Rep. 668; *Ferguson v. Wagner* (1872), 41 Ind. 450; *Rose v. Duncan* (1874), 49 Ind. 269; *Bundy v. Summerland* (1895), 142 Ind. 92, 41 N. E. 322.

The petition for a rehearing is overruled.

NOTE.—Reported in 100 N. E. 875; 101 N. E. 753. See, also, under

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(1) 2 Cyc. 1014; 3 Cyc. 388; (2) 29 Cyc. 951; (3) 38 Cyc. 1992; (4) 27 Cyc. 425; (5) 27 Cyc. 262; (6) 27 Cyc. 265; (8) 38 Cyc. 152, 154. As to sufficiency and effect of tender, see 77 Am. Dec. 470; 30 Am. St. 460.

THE CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY v. DAUN, ADMINISTRATOR.

[No. 7,915. Filed May 8, 1913.]

1. **RAILROADS.—Crossing Accidents.—Duty to Look and Listen.**—A traveler on approaching a railroad crossing must look both ways and listen attentively for approaching trains or cars, and must do all that a reasonably prudent person would do to prevent a collision before he attempts to cross. p. 387.
2. **RAILROADS.—Crossing Accidents.—Looking and Listening.—Presumptions.**—Where one who is injured in a crossing accident could have seen or heard an approaching train in time to escape, if he had looked and listened, it will be presumed either that he did not look and listen or that he did not heed what he saw or heard, and that he saw what he could have seen had he looked, and heard what he could have heard had he listened. p. 387.
3. **RAILROADS.—Crossing Accidents.—Duty to Look and Listen.**—The exercise of ordinary care requires a traveler to look and listen for an approaching car at points in the highway that are reasonably available for that purpose, and in some instances the exercise of due care may require him to stop and look and listen before attempting to cross the track, but this is usually a mixed question of law and fact to be determined by the jury under proper instructions. p. 387.
4. **RAILROADS.—Crossing Accidents.—Right of Traveler to Rely on Signals.**—A traveler has a right to assume that the statutory crossing signals will be given, but he is not thereby relieved from exercising due care. p. 387.
5. **RAILROADS.—Crossing Accidents.—Duty to Look and Listen in Both Directions.**—As a general rule the courts will not say as a matter of law that a traveler should look and listen at a certain point, or points, but he must look and listen for trains in both directions. p. 388.
6. **TRIAL.—General Verdict.—Answers to Interrogatories.**—A general verdict for plaintiff is a finding in his favor on all the issues presented by the pleadings, and is not overcome by the jury's answers to interrogatories unless they are so antagonistic that they and the verdict cannot coexist upon any reasonable hypothesis. p. 388.

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7. **APPEAL.—Review.—Verdict.—Answers to Interrogatories.—Presumptions.**—On appeal all reasonable presumptions and intendments will be indulged in favor of the general verdict, and the jury's answers to interrogatories will be strictly construed against the party moving for judgment on them. p. 388.
8. **RAILROADS.—Crossing Accidents.—Verdict.—Answers to Interrogatories.**—In an action against a railroad company for death in a crossing accident, where it was shown by some of the answers of the jury to interrogatories that at certain places it would have been possible for plaintiff's decedent to have seen the approaching car, the general verdict for plaintiff is not thereby overcome, since presumptions may be indulged whereby such answers are reconcilable with the verdict, in view of the fact that there was no finding that decedent was familiar with the crossing or that he was aware that he could have seen the track at such points. p. 389.
9. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Evidence.—Jury Question.**—The absence of contributory negligence may be shown by circumstances as well as by direct evidence; and if different conclusions may be drawn by fair and reasonably intelligent minds from the circumstances proven, the question is one of fact for the jury. p. 389.

From Porter Circuit Court; *Willis C. McMahan*, Judge.

Action by Herman Daun, administrator of the estate of Edward Langman, deceased, against The Chicago, Lake Shore and South Bend Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

F. J. Lewis Meyer, for appellant.

Grant Crumpacker, William Daly and Watson & Treuthart, for appellee.

IBACH, C. J.—This action was brought to recover damages arising from the alleged negligence of appellant in causing the death of Edward Langman, appellee's decedent, by negligently running one of its cars over and upon him at a crossing while he was traveling upon a public highway. The complaint consists of a single paragraph, in which it is charged that appellant negligently made and constructed said Trail Creek crossing in a dangerous manner, by reason of the deep cut in said railroad and said highway and embankments on each side of the highway, and that appellant

by its agents, servants, officers and employes carelessly and negligently ran a car from the east, without sounding the whistle or gong, and without giving any signal of its approach whatever, and carelessly and negligently ran its car at said time at the rate of seventy miles per hour upon and against said Langman with such force and violence that he was then and there killed. Appellee obtained a verdict and judgment for \$2500.

The only question presented by this appeal relates to the action of the trial court in overruling appellant's motion for judgment on the answers to the interrogatories and appellant insists that these answers show that decedent by his negligence contributed to his injury and death. The answers to interrogatories are in some respects conflicting, but there is no conflict as to the following facts. On February 24, 1909, Edward Langman, the decedent, and his wife Florence Langman were traveling south upon a highway which crosses the defendant's electric railway at a point known as Trail Creek Crossing, near Michigan City. The highway runs north and south, and the railway east and west. The railway runs in a deep cut for a distance of 820 feet to the east of the crossing, and in order to cross the railway at grade the highway was excavated and is in a cut with an embankment to the east. The decedents were in a top buggy, in the daytime, with the side curtains up, driving a gentle horse in a walk at the rate of about four miles per hour. The car struck the rear of the buggy after the horse was entirely clear of the tracks, and threw the occupants out on the south side of the track, killing them, but not injuring the horse. The motorman in charge of the car failed to sound the whistle at the whistling post 800 feet east of the crossing, but saw the horse and buggy when he was about 200 feet from the crossing and then sounded an alarm whistle. No signal of any kind was given before the alarm whistle. When just on the track, Edward Langman, who was driving, looked out from under the curtains, and whipped up the

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horse. The car was traveling 55 miles per hour, and 15 times as fast as the horse. Both Edward and Florence Langman had good eyesight and hearing. The car was making a noise that could be heard for a distance of 300 feet. The wind was blowing from the northwest. Edward Langman did not stop the horse from a distance of 150 feet north of the railway track. He had traveled over the crossing a number of times before. The highway cut extended back 60 feet to the north of the track. There was a fence on top of the bank at the east side of the highway north of the railroad. At a point about 200 or 300 feet to the east of the highway there was a ridge 14 feet high extending north from the railway. The right of way was eighty feet wide, the north rail of the track was thirty feet from the north side of the right of way, and the embankment extended southward 10 or 12 feet from the north line of the right of way. There was a panel board fence running up and down in a slanting direction along the slope of the said embankment. The car projected over the north rail of the track $2\frac{1}{2}$ feet. Langman and his wife did not see the car in time to avoid a collision.

Many interrogatories were submitted to the jury asking what decedents could have seen and heard at various observation points, namely, 46, 38, 35, 27, $23\frac{1}{2}$, 20, 19, 18, 16, 14 and 12 feet from the north rail of the track. To nearly all of these the answers are that the car could not have been seen by decedents at these points, or could not have been seen and heard in time to avoid collision by stopping, and if they had stopped and carefully looked and listened they could not have seen and heard the car in time to avoid the collision. Appellant relies upon the answers to interrogatories Nos. 159 and 160, which are that if decedents had carefully looked and listened for the car at a point 35 feet north of the north rail of the tracks on the highway, they could have seen and heard the car in time to avoid a

collision on the tracks by stopping. These answers are nullified by that to No. 170, which is that at a point on the highway 35 feet north from the north rail, the car could have been seen as far east as the second trolley pole from the crossing, a distance of about 247 feet. When this answer is considered in connection with the answers to 206 and 208 from which it appears that when decedents were 38 feet north of the crossing the car was 570 feet east of it and going at a rate 15 times that of the horse. From this it follows that when the decedents were at a point on the highway 35 feet north of the north rail, the car was 525 feet east of the crossing, and consequently not within range of their vision. The answers to Nos. 159 and 160 are in direct conflict with the answer to No. 243, which is that decedents could not have seen the car approaching until after they had passed to the south of the embankment, and according to No. 241, this embankment extended to within 18 or 20 feet of the track. Appellant also relies upon the answers to Nos. 128 and 129, that from a point on the highway 19 feet north of the north rail, if decedents had carefully looked for the car and diligently and carefully listened for it, they could have heard and seen the car in time to avoid a collision on the track by stopping. By No. 270 it is found that if the decedents had stopped 19 feet before they reached the north rail, their horse's nose would have been about $4\frac{1}{2}$ feet distant from the side of a passing car. But the answers to Nos. 120 to 139 show that at points 20, 14, 16, and 18 feet north of the north rail they could not have seen and heard the car in time to avoid the collision by carefully looking and listening, or as is found by the answers to Nos. 112 to 120, by stopping and looking and listening at these same points. The answer to No. 236 is that decedents would have to be within 12 feet of the north rail in order to have a clear and unobstructed view of the tracks to the eastward. The answers to Nos. 259 and 260 show that at a point on the highway 19 feet north of the north rail they could not see said car approaching

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without looking between the bottom board and the next board of the fence, between which boards there was about six inches space. The answers to interrogatories Nos. 89 and 90, which are in conflict with some others, are that they could not see the car at any point between 19 feet north of the rail and the north rail.

The law imposes upon a person traveling upon a highway when approaching a railroad crossing the duty of looking both ways and listening attentively for approaching

1. trains or cars, and he is required to do all that a reasonably careful and prudent person would do to prevent a collision before he attempts to cross over. "The law presumes, in case of injury of a traveler at a crossing, that

if by looking he could have seen, or by attentively

2. listening he could have heard the approaching train in time to escape, either that he did not look and listen, or that he did not heed what he saw or heard, that he saw what he could have seen had he looked, and heard what he could have heard had he listened." *Chicago, etc., R. Co. v. Turner* (1904), 33 Ind. App. 264, 267, 69 N. E. 484, and cases there cited. The exercise of ordinary care also

requires the traveler to look and listen for an ap-

3. proaching car at points and places in the highway which would be reasonably available for that purpose, where his view of the track would not be cut off, and in some instances in the exercise of due care, the traveler may be required to stop, look and listen, before attempting to cross over a dangerous crossing, but this is usually a mixed question of law and fact, to be passed upon by the jury under proper instructions by the court. 3 Elliott, Railroads §1167; *Malott v. Hawkins* (1902), 159 Ind. 127, 134, 63 N. E. 308; *Gray v. Pennsylvania R. Co.* (1896), 172 Pa. St. 383, 33 Atl. 697.

However, the traveler is entitled to assume that the

4. statutory signals at the crossings will be given, though this does not relieve him from the exercise of due

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care. *Cleveland, etc., R. Co. v. Lynn* (1909), 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017; *Cleveland, etc., R. Co. v. Van Laningham* (1913), 52 Ind. App. 156, 97 N. E. 573; *Malott v. Hawkins, supra*.

And as a general rule the courts will not say as a
5. matter of law that a traveler should look and listen at a certain point, or points. *Cleveland, etc., R. Co. v. Harrington* (1892), 131 Ind. 426, 30 N. E. 37; *Cleveland, etc., R. Co. v. Lynn, supra*; *Chicago, etc., R. Co. v. Turner, supra*; *Pittsburg, etc., R. Co. v. Lynch* (1909), 43 Ind. App. 177, 87 N. E. 40.

The traveler is under an equal duty to look and listen for trains in both directions. *Cleveland, etc., R. Co. v. Wuest* (1908), 41 Ind. App. 210, 83 N. E. 620; *Cleveland, etc., R. Co. v. Harrington, supra*; *Thornton v. Cleveland, etc., R. Co.* (1892), 131 Ind. 492, 31 N. E. 185; *Mann v. Belt R., etc., Co.* (1891), 128 Ind. 138, 26 N. E. 819; *New York, etc., R. Co. v. Robbins* (1906), 38 Ind. App. 172, 76 N. E. 804.

It is insisted by appellant that the jury found by its answers to the interrogatories that the decedent at thirty-five feet and nineteen feet respectively from the north rail of the track, by looking and listening could have seen the car in time to have avoided the collision by stopping, also that the car could have been heard for 300 feet, and that these facts having been so found by the jury, they are so incompatible with the exercise of due care on decedents' part as to entirely overthrow the general verdict. In the considera-

tion of these contentions it must be kept in mind that

6. by the general verdict the jury has found all the issues presented by the pleadings in favor of appellee; also that before the answers to the interrogatories can overcome the general verdict, there must be such antagonism between the two that both can not coexist, upon any reasonable hypothesis. Furthermore, to support the gen-

7. eral verdict we are permitted to indulge all reasonable presumptions and intendments in its favor, and

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to resolve all conflicts between the answers themselves in favor of the general verdict, while on the other hand, we are required to strictly construe the answers to interrogatories against the party moving for judgment on them, notwithstanding the general verdict. *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 53 N. E. 235; *Stoy v. Louisville, etc., R. Co.* (1903), 160 Ind. 144, 66 N. E. 615; *Shoner v. Pennsylvania Co.* (1892), 130 Ind. 170, 28 N. E. 616, 29 N. E. 775.

Guided by these well-established principles, we are of the opinion that the answers are not of such a character as to warrant us in holding as a matter of law, that Ed-

8. ward Langman was guilty of negligence contributing to his injury and death, which will prevent a recovery by his administrator. Although the jury finds that at a point 19 feet from the track the car could have been seen and heard, if decedent had carefully looked and listened, yet it was the duty of the decedent to look in both directions for approaching cars, and if he did not look toward the car at the instant he reached the 19 foot point, we are permitted to indulge the presumption in support of the general verdict that some noise or other cause may have attracted his attention in the opposite direction, for the decedent had as much reason to expect a car from the west as from the east, the direction from which it was approaching. It is not found that the car could have been seen at any other point than this one point, until the horse would be on the track. It is found that it could not have been seen at points 20 and 18 feet from the track. It is not found that Langman was familiar with the crossing, nor is there any finding from which it can be said that he was aware that the track could have been seen at this particular point. Therefore, the general verdict and the answers to the interrogatories can be very readily reconciled, and both be permitted to

9. stand. The absence of contributory negligence may be shown by circumstances as well as by direct evi-

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dence, and if different conclusions may be drawn by fair and reasonably intelligent minds from the circumstances proven, the question is one of fact for the jury to determine, and the court will not determine such issue as a matter of law. It would be unfair under all the answers in this case, simply because the jury has found that at one point in the highway at a distance of 19 feet from the track, when the horse was then less than five feet from the track, decedent could have seen the approaching car through a hole in the fence had he looked carefully in that direction, to say that as a matter of law he was negligent, because he did not see the car from that point, and proceeded to cross, especially when it does not appear that he was aware that the track to the eastward could have been seen at this particular point. Our holding is fully supported by the cases previously cited, and also by the following: *Wallenburg v. Missouri Pac. R. Co.* (1910), 86 Neb. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135, and note; *Peirce v. Ray* (1900), 24 Ind. App. 302, 56 N. E. 776; *Wieland v. Delaware, etc., Canal Co.* (1898), 51 N. Y. Supp. 776, 30 App. Div. 85; *Winstanley v. Chicago, etc., R. Co.* (1888), 72 Wis. 375, 39 N. W. 856; *Hubbard v. Boston, etc., R. Co.* (1894), 162 Mass. 132, 38 N. E. 366. The answers made by the jury to the interrogatories lack much of finding such clear and culpable negligence on the part of Langman as to warrant this court in holding as a matter of law that he was guilty of contributory negligence, and no case has been cited, neither can we find one sufficiently analogous to authorize such a conclusion.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 731. See, also, under (1) 38 Cyc. 1000; (2) 33 Cyc. 1006; (3) 33 Cyc. 1010, 1012; (4) 33 Cyc. 1027, 1031; (5) 33 Cyc. 1009; (6) 38 Cyc. 1929; (7) 38 Cyc. 1928; (8) 33 Cyc. 1142; 38 Cyc. 1927; (9) 33 Cyc. 1111. As to contributory negligence of persons on track who fail to be on lookout for trains, see 51 Am. Rep. 361. As to contributory negligence as a question for the jury, see 8 Am. St. 349. As to the care and precautions necessary in crossing railroad track generally, see 24 L. Ed. U. S. 403. For failure to give customary signals as excusing nonper-

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formance of duty to look and listen, see 3 L. R. A. (N. S.) 391. For a discussion of the failure of a railroad company to give the statutory signals on approaching a crossing as an excuse for a traveler's contributory negligence, see 6 Ann. Cas. 78.

GUYNN v. WABASH COUNTY LOAN AND TRUST COMPANY ET AL.

[No. 7,990. Filed May 8, 1913.]

1. **APPEAL.—Review.—Demurrer to Complaint.—Exceptions to Conclusions of Law.**—Where the court makes a special finding of facts and states conclusions of law thereon, the question presented by appellant's exceptions to the conclusions is the same as that raised by the demurrer to the complaint. p. 392.
2. **APPEAL.—Review.—Exceptions to Conclusions of Law.—Admissions.**—An exception to conclusions of law, for the purposes of the exception, admits that the facts have been fully and correctly found. p. 394.
3. **ESTOPPEL.—Equitable Estoppel.—Permitting Mortgage.**—Where a testatrix devised all her real estate to a son and daughter equally, and thereafter conveyed the real estate to the daughter who did not record the deed, and the daughter, after the death of the testatrix, joined the son in procuring the probate of the will, and with knowledge of the negotiations, but without disclosing the existence of the deed, permitted the son in good faith to obtain a loan secured by mortgage on the real estate, she is estopped from asserting her title as against the mortgagee. pp. 394, 395.
4. **WILLS.—Time of Taking Effect.**—A will speaks as of the date of the death of the testator. p. 395.
5. **FRAUDULENT CONVEYANCES.—Failure to Record Deed.—Effect.**—Special findings that a testatrix, after devising all her real estate to a son and daughter, conveyed the same to her daughter, that the latter did not record the deed or disclose its existence, but after the death of the testatrix joined her brother in procuring the probate of the will and thereafter permitted him in good faith to obtain a loan secured by mortgage on the real estate, presents a case within the spirit of §3962 Burns 1908, §2931 R. S. 1881, providing that every conveyance not recorded within forty-five days from date of execution shall be fraudulent and void as against any subsequent *bona fide* purchaser, lessee or mortgagee, so that such deed must be deemed fraudulent as against the mortgagee. p. 395.

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6. **APPEAL.—Erroneous Judgment.—Failure to Ask Modification.—Effect.**—Where a judgment is valid in part, the same will stand on appeal, unless the record shows that proper steps were taken by objection presented to the trial court to secure a modification of the same. p. 396.
7. **APPEAL.—Burden of Showing Error.**—Appellant has the burden of pointing out and presenting error in substantial conformity with the rules of court. p. 397.
8. **APPEAL.—Review.—Judgment.—Presumptions.**—On appeal every presumption is indulged in favor of the judgment, and the court will not search the record for errors on which to base a reversal. p. 397.

From Grant Superior Court; *Robert M. VanAtta*, Judge.

Action by the Wabash Loan and Trust Company against Katherine M. Guynn and another. From a judgment for plaintiff, the defendant, Katherine M. Guynn, appeals. *Affirmed.*

D. F. Brooks, for appellant.

Sayre & Hunter and *Condo & Browne*, for appellee.

ADAMS, J.—Action by appellee, Wabash County Loan and Trust Company, against appellee, William A. Newman, and appellant, to recover on a promissory note, and to foreclose a mortgage securing the payment of said note, executed by appellee Newman, on certain real estate in Wabash County, Indiana. The court overruled appellant's demurrer to the complaint, and this ruling constitutes the first error assigned. The court, on request, made a special finding of facts and stated conclusions of law thereon, and, as appellant's exception to the conclusions of law presents the same question as the demurrer to the complaint, the overruling of the demurrer is immaterial. *Timmonds v. Taylor* (1911), 48 Ind. App. 531, 533, 96 N. E. 331, and cases cited.

The facts found by the court are substantially as follows: William A. Newman and Katherine M. Guynn are the children of Mary A. Newman, who died June 21, 1907, the owner in fee simple of the real estate described in the mort-

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gage filed with the complaint. Mary A. Newman died testate, and, at the request of defendants, her will was duly probated. On July 11, 1907, one Lincoln Guynn, husband of appellant, applied for and obtained letters of administration, with will annexed, on the estate of Mary A. Newman, and entered on the discharge of the duties of his trust. By her said will, Mary A. Newman bequeathed and devised in equal shares all of her real and personal property to the defendants Newman and Guynn. In November, 1905, Katherine M. Guynn received from her mother a paper, purporting to be a deed of conveyance to said Katherine of all the real estate owned by her said mother, which deed included the lands described in the mortgage. The defendant Guynn was in possession of said deed from November 4, 1905, to and including March 4, 1908, at which time the same was recorded, and said Katherine M. Guynn at that time and ever since has claimed title in fee simple to all the lands described therein. While in possession of said deed, Katherine M. Guynn requested that the will of her mother be probated, and an administrator appointed, and accepted the conditions and provisions of said will, but withheld said deed from record, and concealed the fact of its execution from the plaintiff and from her codefendant, William A. Newman, until the same was recorded on March 4, 1908. Katherine M. Guynn knew, or had the means of knowing the contents of said deed at the time the will was probated and at the time she accepted the conditions and provisions made for her therein. She knew that her codefendant, William A. Newman, was endeavoring to negotiate a loan on his undivided interest in the real estate devised to him by the will of his mother, and also knew that any person, bank or loan company would probably extend credit for any reasonable amount upon his interest in said real estate. William A. Newman informed his sister and codefendant before procuring the loan made to him by the plaintiff that he was intending to negotiate a loan and secure the same by mortgage

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upon his interest in the real estate, and informed the administrator of such fact. Katherine M. Guynn at no time made any objection thereto or gave any notice of any claim of ownership in said lands other than that conferred upon her by the will of her mother. On December 21, 1907, William A. Newman did procure from plaintiff a loan of \$750, payable in one year, giving his note therefor, and securing the same by a mortgage to the plaintiff on his undivided one-half interest in the real estate devised to him by the will of his mother. This mortgage was made in good faith by Newman, and without knowledge of any claim by his sister, Katherine M. Guynn, therein, other than that devised to her by said will. The mortgage so executed was duly recorded on December 24, 1907, and plaintiff had no knowledge of the deed to Katherine M. Guynn until the same was recorded more than one hundred days after the loan was made.

Upon the facts found, the court stated conclusions of law favorable to appellee, Wabash County Loan and Trust Company, and rendered personal judgment against defendant Newman for the amount due on his note, and judgment of foreclosure against both defendants. By her exception to

the conclusions of law, appellant admits, for the pur-

2. poses of the exception, that the facts have been fully and correctly found. *National State Bank v. Sanford Fork, etc., Co.* (1901), 157 Ind. 10, 15, 60 N. E. 699; *Blair v. Curry* (1898), 150 Ind. 99, 101, 46 N. E. 672, 49 N. E. 908; *City of Indianapolis v. Board, etc.* (1902), 28 Ind. App. 319, 323, 62 N. E. 715; *Wills v. Mooney-Mueller Drug Co.* (1912), 50 Ind. App. 193, 97 N. E. 449, 451.

Taking the findings as full and true, the question raised by the exception is, Do the findings support the conclusions of law? Appellee, Wabash County Loan and Trust

3. Company, does not contend that the deed to appellant from her mother did not invest her with title to the lands described in the mortgage. The position of appellee is that appellant, by her conduct, is estopped to deny the

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title of her brother in the undivided one-half of the mortgaged premises, as against a good faith mortgagee for value. No case has been cited, and we have been unable to find a case wherein the facts are identical with the facts found by the court. In this case, it is clear that the mortgagor had no title to the lands mortgaged by him at the time of executing the mortgage or at any time. A will speaks as of the date of the death of the testator. While the mortgagor,

4. by the will of his mother, was given a half interest in all the real estate owned by her, she owned no real estate at her death, having conveyed all that she had

3. to appellant. There is no finding that William A.

Newman had any knowledge of the deed to his sister.

On the contrary, the court found that Newman acted in good faith in procuring the loan from appellee trust company. But appellant, with knowledge of all the facts, joined her brother in having the will probated, which gave him an apparent title to half of the real estate devised. She knew he had no title. She knew he was negotiating a loan on lands that he did not own, and, with such knowledge, concealed and withheld her deed from record. We think the findings of the court bring this case within the rule that where the owner of real estate permits title to be taken and held in another, and where third parties give credit to such other person on the strength of his record title, without knowledge, actual or constructive, of the rights of the real owner, the latter will be estopped to assert title as against such creditors. *Wisehart v. Hedrick* (1889), 118 Ind. 341, 344, 21 N. E. 30; *Maxon v. Lane* (1890), 124 Ind. 592, 598, 24 N. E. 683; *Minnich v. Shaffer* (1893), 135 Ind. 634, 637, 34 N. E. 987; *Duckwall v. Kisner* (1893), 136 Ind. 99, 101, 35 N. E. 697; *Kiefer v. Klinsick* (1896), 144 Ind. 46, 56, 42 N. E. 447. The findings further appear to bring the case at least within the spirit of the statute, §3962 Burns

5. 1908, §2931 R. S. 1881, which provides that every conveyance or mortgage of lands or of any interest

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therein shall be recorded in the recorder's office of the county where such lands are situate, and that every conveyance not so recorded within forty-five days from the date of execution, shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration. Mary A. Newman died testate in June, 1907, and within a few days, her will was duly probated. The mortgage in suit was executed in December, 1907, and the deed of appellant from her mother was recorded in March, 1908. While the mortgagor had no title to the mortgaged premises, he had an apparent title by the will of his mother, which was admitted to probate at the instance of appellant, long prior to the date of the mortgage. We think appellant's deed, under the facts found, must be deemed to be fraudulent as against appellee trust company, for failure to record within the statutory period. *State Bank v. Backus* (1903), 160 Ind. 682, 694, 67 N. E. 512; *Meikel v. Borders* (1891), 129 Ind. 529, 532, 29 N. E. 29.

Appellant complains that the judgment of foreclosure included the entire tract of land mortgaged, and was not limited to the undivided one-half thereof. In this re-

6. spect the judgment was erroneous. The record, however, does not show a motion to modify the judgment, and it has been held that where a part of the judgment is valid, the same will stand, unless proper steps have been taken by objection presented to the trial court to secure a modification of the same. *Bayless v. Glenn* (1880), 72 Ind. 5, 11; *Becknell v. Becknell* (1887), 110 Ind. 42, 54, 10 N. E. 414; *Peoples Sav., etc., Assn. v. Spears* (1888), 115 Ind. 297, 300, 17 N. E. 570; *Chicago, etc., R. Co. v. Eggers* (1897), 147 Ind. 299, 303, 45 N. E. 786; *Jarrell v. Brubaker* (1898), 150 Ind. 260, 271, 49 N. E. 1050; *Studabaker v. Markley* (1893), 7 Ind. App. 368, 374, 34 N. E. 606; *Brandis v. Grisom* (1901), 26 Ind. App. 661, 664, 60 N. E. 455.

The last error assigned is based on the overruling of ap-

pellant's motion for a new trial. The brief of appellant does not show that a motion for a new trial was filed, 7. the ground of such motion, the ruling of the court thereon, or the page and line of the record where the same may be found. The burden is upon the party appealing, not only to point out error of the trial court, but to present the same in substantial conformity with the rules of this court. On appeal every presumption is indulged in favor of the judgment, and we will not search the 8. record for errors on which to base a reversal. *State, ex rel. v. John* (1908), 170 Ind. 233, 238, 84 N. E. 1; *Kraus v. Lehman* (1908), 170 Ind. 408, 415, 83 N. E. 714, 84 N. E. 769, 15 Ann. Cas. 849; *Emerson v. Opp* (1894), 9 Ind. App. 581, 587, 34 N. E. 840, 37 N. E. 24; *Elijah v. Dowling* (1912), 49 Ind. App. 515, 97 N. E. 551.

The judgment is affirmed.

NOTE.—Reported in 101 N. E. 738. See, also, under (1) 2 Cyc. 717; (2) 38 Cyc. 1992; (3) 16 Cyc. 762; (4) 40 Cyc. 1424; (5) 20 Cyc. 552; (6) 2 Cyc. 703; (7) 3 Cyc. 275. As to wills as conveyances to take effect only after maker's death, see note to *Wilson v. Carrico* (Ind.), 49 Am. St. 219. As to acquiescence as basis of equitable estoppel, see 134 Am. St. 1024. As to fraudulent conveyance and disability of assenting creditor to raise the question, see 18 Am. Dec. 621. For a discussion of the right of a purchaser of or from an heir as against the grantee in an unrecorded conveyance from the ancestor, see Ann. Cas. 1912 B 1289.

THE JENNEY ELECTRIC MANUFACTURING COMPANY v. FLANNERY.

[No. 8,116. Filed May 10, 1912. Rehearing denied May 9, 1913.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Safety Appliances.—Complaint.—“Dust.”*—A complaint charging defendant's failure to equip its emery wheel with an exhaust fan as required by the factory act (§8029 Burns 1908, Acts 1899 p. 231), and alleging that a large number of small and irregular particles, of which the wheel was composed, became dislodged therefrom in the form of dust and were projected in the form of dust violently from the wheel into the air, and that particles thus thrown off in the

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form of dust struck plaintiff's eye and produced the injury complained of, is not objectionable on the ground that it shows that the injury was not caused by dust, but by small particles of the wheel thrown off in its use, since if the particles were so small and fine that an exhaust fan would have carried them away and prevented the injury, they may properly be regarded as "dust" within the meaning of the statute. p. 402.

2. MASTER AND SERVANT.—*Safety Appliances.—Exhaust Fans.—Statutes.*—The purpose of the statute (§8029 Burns 1908, Acts 1899 p. 231), requiring exhaust fans on emery wheels is to reduce the hazard incident to the operation of such wheels. p. 402.
8. TRIAL.—*Verdict.—Answers to Interrogatories.—Conflicting Answers.*—Conflicting answers by the jury to interrogatories nullify each other and do not affect the general verdict. p. 403.
4. TRIAL.—*Answers to Interrogatories.—Effect.*—Answers by the jury to interrogatories showing that a fact was not established with certainty, or that there was no possibility of the jury ascertaining such fact with certainty, do not amount to a finding that such fact was not established by a preponderance of the evidence. p. 404.
5. TRIAL.—*Interrogatories to Jury.—Construction.*—If an interrogatory is doubtful in its meaning, the doubt will be resolved in favor of the general verdict. p. 404.
6. MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.*—A verdict for plaintiff in a servant's action for personal injuries is not overcome by the jury's answer to an interrogatory that the injury was purely accidental, where other answers show that the injury was due to the negligence of defendant, and it appears from the answers as a whole that the jury did not mean that the injury was "purely accidental" in the sense that it occurred without the fault of any one. p. 404.
7. MASTER AND SERVANT.—*Injuries to Servant.—Choice of Methods of Work.—Right of Recovery.*—Where there are two ways of performing a service, one of which is safe and the other dangerous, or one of which is more dangerous than the other, and the servant is aware of such facts, he will not, as a general rule, be permitted to recover damages from the master for injuries resulting from his voluntary adoption of the dangerous or more dangerous way. pp. 406, 407.
8. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—A servant assumes all the usual and ordinary risks incident to the employment, and also the risk of any known dangers that may arise during the course of such employment, even though not usually incident thereto, so that where the servant knows of a condition which renders the performance of his duties hazardous, and voluntarily encounters it, he cannot recover for injuries there-

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by sustained, even though such danger was due to the master's negligence. p. 406.

9. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.—Care by Servant.*—Where the injury is the result of one of the risks assumed, the servant cannot recover, regardless of the care or want of care on the part of such servant in encountering the danger. p. 406.

10. MASTER AND SERVANT.—*Injuries to Servant.—Contributory Negligence.—“Reasonable Care.”*—The question of whether an injured party was guilty of contributory negligence depends upon whether he was exercising reasonable care at and immediately prior to the injury, that is such care as persons of ordinary prudence would exercise under the conditions and circumstances of the particular case. p. 408.

11. NEGLIGENCE.—*Reasonable Care.—Jury Question.*—The question of reasonable care is usually one of fact for the jury since it is only in cases where the facts are undisputed and are such that but a single inference may reasonably be drawn therefrom, that the court can determine as a matter of law that reasonable care was or was not exercised. p. 408.

12. MASTER AND SERVANT.—*Injuries to Servant.—Choice of Methods of Work.—Contributory Negligence.*—Contributory negligence cannot be imputed to a servant from the mere fact that he chooses the more dangerous way or method of performing a duty when a safer method was open to his choice, but is a question for the jury, except where the servant's choice exposed him to dangers so obvious that no reasonable man exercising ordinary care for his own safety would have encountered them, and there is no room for reasonable minds to differ upon the question. p. 408.

13. MASTER AND SERVANT.—*Injuries to Servant.—Violation of Statutory Duty.—Assumption of Risk.—Contributory Negligence.*—Although a servant's right to recover may be determined by the application of the doctrine of assumption of risk in cases where the danger created by the negligence of the master is one that can be assumed by the servant under his contract, where the negligence charged consists of the master's violation of a statutory duty, assumption of risk does not apply, and the question must be determined by the principles of law relating to contributory negligence. p. 410.

14. MASTER AND SERVANT.—*Injuries to Servant.—Choice of Methods of Work.—Contributory Negligence.—Answers to Interrogatories.*—In an action by a servant to recover for injury to his eye caused by emery dust lodging therein while plaintiff was sharpening a tool on the emery wheel, where the negligence charged was the master's failure to provide an exhaust fan to remove the dust, as provided by §8029 Burns 1908, Acts 1899 p. 231, and the jury's

answers to interrogatories showed that defendant had supplied the emery wheel to plaintiff to be used in sharpening his tools, that it was suitable for the purpose and that the superintendent had directed plaintiff to use it, it cannot be said as a matter of law that plaintiff was guilty of contributory negligence in using such emery wheel instead of making use of a tool room provided by the master wherein tools could be sharpened with more safety. p. 411.

15. MASTER AND SERVANT.—*Injuries to Servant.—Evidence.—Sufficiency.*—In a servant's action for injuries to his eye caused by emery dust lodging therein while plaintiff was sharpening a tool on an emery wheel, where the complaint proceeded on the theory that plaintiff was employed as a machinist and that it was a part of his duties under such employment to keep his tools sharp by grinding them on the emery wheel which defendant had provided for that purpose, evidence showing that a part of plaintiff's work was to sharpen the drills with which he worked and that he usually sharpened all his tools on such emery wheel, that the superintendent often saw him grinding tools on such wheel, and on one occasion had specially directed plaintiff to grind a drill thereon, is sufficient to show that plaintiff was acting within the scope of his employment at the time he received his injury. p. 411.

16. MASTER AND SERVANT.—*Injuries to Servant.—Choice of Methods of Work.—Contributory Negligence.—Evidence.*—Where, in a servant's action for injuries, the evidence shows that the way adopted by plaintiff was one of the ways provided by the master, or at least a way recognized by him as a proper one, and there was evidence to justify the jury in finding that plaintiff was exercising ordinary care at the time of the injury, the verdict for plaintiff cannot be disturbed on the ground that plaintiff was guilty of contributory negligence in choosing a dangerous way when a safer way had been provided by the master. p. 412.

17. MASTER AND SERVANT.—*Injuries to Servant.—Proximate Cause.—Evidence.—Sufficiency.*—In an action by a servant for injury to his eye occasioned by a particle of emery dust lodging therein, evidence showing that the emery wheel had not been equipped with an exhaust fan, that an exhaust fan would not carry away all particles of emery rebounding from the wheel, but that it would do so to some extent, and that plaintiff's injury was caused by a minute particle of emery, was sufficient to warrant the jury in concluding that the failure to provide the exhaust fan was the proximate cause of the injury, although it was not expressly shown that the particle causing the injury was one that would have been removed by an exhaust fan had one been provided. p. 413.

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18. **NEW TRIAL.**—*Answers to Interrogatories.*—*Evidence.*—A new trial is not warranted on the ground that a fact found by an answer to an interrogatory is not sustained by the evidence, unless the fact is one which is essential to the general verdict. p. 415.
19. **NEGLIGENCE.**—*Contributory Negligence.*—*Aggravation of Injuries.*—*Damages.*—Subsequent negligence of an injured party which tends to aggravate the injury, although to be considered as affecting the measure of damages, does not bar a recovery of such damages as were occasioned by the original injury. p. 416.
20. **APPEAL.**—*Review.*—*Instructions.*—In an action by a servant for injury to his eye caused by a particle of emery dust, appellant cannot complain of the court's failure to include a definition of "dust" in the instructions, if he failed to tender the court an instruction containing a proper definition. p. 416.
21. **APPEAL.**—*Review.*—*Refusal of Instructions.*—There is no error in refusal of instructions that are fully covered by instructions given. p. 416.
22. **MASTER AND SERVANT.**—*Injuries to Servant.*—*Evidence.*—*Admissibility.*—In an action for personal injuries by a servant whose eye was injured by a flying particle of emery from an emery wheel on which he was sharpening a drill, there was no error in the admission of testimony to prove that it was customary for the employes to sharpen their drills and other tools on the emery wheel at which plaintiff was working when he received the injury. p. 417.

From Marion Circuit Court (17,919); *Charles Remster*, Judge.

Action by Thomas Flannery against The Jenney Electric Manufacturing Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Elmer E. Stevenson, for appellant.

Miller & Dowling, for appellee.

LAIRY, J.—The appeal in this case is taken from a judgment rendered by the trial court in favor of appellee for damages caused by the loss of an eye through the alleged negligence of appellant. The negligence charged in the complaint was the failure of appellant to equip an emery wheel located in its factory with an exhaust fan in accord-

ance with the provisions of our factory act. §8029 Burns 1908, Acts 1899 p. 231. Appellee was employed in the factory as a machinist and received the injury while using said emery wheel. A demurrer to the complaint was overruled and this is the first error relied on for reversal. Appellant

objects to the sufficiency of the complaint on the

1. ground that it appears from the averments thereof that the injury was not caused by dust escaping from the emery wheel, but by particles of the wheel thrown off in its use, and that an exhaust fan was not intended to prevent and would not have prevented an injury from such a source. This objection is not well taken. The complaint avers in substance that a large number of small and irregular particles, of which the wheel was composed, became dislodged therefrom in the form of dust, by reason of the contact of the revolving wheel with the tool, and were projected in the form of dust violently from the wheel into the air, and that particles of the wheel and of the tool which he was sharpening, thus thrown off in the form of dust, struck him in the eye causing the injury for which he sues. These averments sufficiently charge that the particles which struck and injured plaintiff's eye were sufficiently small to be properly denominated as dust. If the particles thrown off from either the wheel or the tool which was being sharpened were so small and light that an exhaust fan of proper power, correctly attached and operated in connection with the emery wheel, would have carried them away and prevented the injury, then it may be properly regarded as "dust" within the meaning of the statute. §8029 Burns 1908, Acts

2. 1899 p. 231. The purpose of the statute requiring exhaust fans on emery wheels is to reduce the hazard incident to their operation. No doubt, as contended by appellee, the statute was intended to provide a means for carrying away the dust which would otherwise float in the air, and produce injurious results to those who breathed it, but if the result of the use of such a fan in connection with the

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operation of an emery wheel is to carry away small particles of matter thrown off from such wheels while in operation, it has the effect to afford protection to the eyes of persons employed at such wheels. We can not say that the legislature did not intend that the statute should have this effect. *Muncie Pulp Co. v. Hacker* (1906), 37 Ind. App. 194, 76 N. E. 740; *Indianapolis Foundry Co. v. Bradley* (1910), 45 Ind. App. 530, 89 N. E. 505. The averments of the complaint show clearly that the injury to the eye of appellee was caused by dust and that an exhaust fan would have prevented the injury. The complaint is otherwise sufficient and the demurrer was properly overruled.

The jury returned with its general verdict answers to 106 interrogatories submitted by the court. The second error assigned is that the court erred in overruling the motion of appellant for judgment in its favor notwithstanding the general verdict. Upon this question it is first asserted that the interrogatories show that the negligence of the appellant was not the proximate cause of the injury to appellee. As sustaining this contention we are cited to interrogatory No. 74, and the answer thereto which are as follows: "Is there any certainty that an exhaust fan would have prevented the particle from getting into plaintiff's eye? A. No possibility." Appellant claims that this amounts to a finding that there is no possibility that an exhaust fan would have prevented the injury. As the interrogatory is framed and answered, its meaning is not entirely clear. It might mean that there was no possibility that an exhaust fan would have prevented the injury; but if it has such meaning it is in conflict with interrogatory No. 63, in answer to which the jury finds that an exhaust fan or guard would have prevented the particle from getting into appellee's eye. In case two interrogatories are

3. in conflict, they nullify each other and the general verdict is not affected by either. *Terre Haute, etc., R. Co. v. Mason* (1897), 148 Ind. 578, 46 N. E. 332; *Fire-*

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mans Fund Ins. Co. v. Dunn (1899), 22 Ind. App. 332, 53 N. E. 251. If by its answer, the jury meant that there was no possibility of determining this fact with certainty, such answer will not overthrow the general verdict. If the fact was established by a preponderance of the evidence, the jury was justified in finding such fact to be true by its general

verdict. Absolute certainty is not required and an-

4. swers to interrogatories showing that a fact was not established with certainty or that there was no possibility of the jury ascertaining such fact with certainty, would not amount to a finding that such fact was not established by a preponderance of the evidence. If an interroga-

tory is doubtful in its meaning, such doubt will be

5. resolved in favor of the general verdict. *Jones v. Austin* (1901), 26 Ind. App. 399, 59 N. E. 1082; *Haughton v. Aetna Life Ins. Co.* (1908), 42 Ind. App. 527. 85 N. E. 125, 85 N. E. 1050.

By the answer to interrogatory No. 66 the jury

6. finds that the injury to appellee was purely accidental. This answer is nullified by answers to other interrogatories which show that the injury was due to the negligence of appellant. From an examination of the answers to interrogatories as a whole it is apparent that the jury did not mean that the injury was "purely accidental," in the sense that it occurred without the fault of anyone.

Appellee was employed as a machinist in appellant's factory. The answers to interrogatories show that he was a man of mature years and was experienced in doing the work in which he was engaged; that it was a part of the duty of appellee to sharpen the drills used by him, and that appellant supplied an emery wheel in the factory for the purpose of enabling him to sharpen his drills thereon; that the emery wheel so supplied was suitable for that purpose and appellee was required by the superintendent to use it; that appellee had, before that time, sharpened metal tools on emery wheels, and knew fully the danger incident to such work,

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and that he knew, at the time he was grinding his drill on the emery wheel just before his injury, that such wheel was of coarse construction and that it was revolving very rapidly throwing off particles of the wheel and metal with great force, and that he also knew that such flying particles were dangerous and that he was likely to be injured thereby. The interrogatories also show that at the time of the injury to appellee, appellant maintained in its factory a tool room, and employed therein skilled men, a part of whose duty it was to sharpen metal drills; that the machinery in the tool room which was used for grinding drills, was in good working order at the time of appellee's injury, and that he knew of all these facts. That he had previously had his drills sharpened in this room and knew at and prior to his injury that he could get them sharpened there; that there was nothing to prevent him from having his drill sharpened in this room and that, if he had done so, he would not have been injured. The answers to interrogatories further show: that there was no general rule in the machine shop requiring that tools should be taken to the tool room to be sharpened, and that appellee voluntarily went to the emery wheel to sharpen his drill thereon. Interrogatory No. 91 is as follows: "Should not plaintiff have had the drill sharpened in the tool room?" To which the jury answered "No." From the facts so found by the jury it appears that plaintiff was provided with two means by which his drills could be sharpened in case they required it. He could take them to the tool room to be sharpened, or he could sharpen them himself on the emery wheel provided for that purpose. Had he employed the first means it would have been attended with no danger and he would not have been injured, but he voluntarily adopted the second means, thereby exposing himself to a danger which he well understood and appreciated. The question is Do these facts show as a matter of law that appellee was guilty of contributory negligence? Where a servant has a duty to perform, and there are two

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ways or methods of performing it, one of which is
7. safe and the other dangerous, or one of which is more dangerous than the other, and when he knows that one way is safe and the other dangerous, or that one way is more dangerous than the other, it may be stated as a general rule that he will not be permitted to recover damages from the master for injuries received as a consequence if he voluntarily adopts the dangerous way or the more dangerous of two ways when a safe or a safer way was open to him. *New York, etc., R. Co. v. Hamlin* (1908), 170 Ind. 20, 83 N. E. 343, 15 Ann. Cas. 988; *Consolidated Stone Co. v. Redmon* (1899), 23 Ind. App. 319, 55 N. E. 454; *Chamberlain v. Waymire* (1904), 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81; *Gilbert v. Chicago, etc., R. Co.* (1903), 123 Fed. 832; *Newport News Pub. Co. v. Beaumeister* (1904), 102 Va. 677, 47 S. E. 821; *Schoultz v. Eckardt Mfg. Co.* (1904), 112 La. 568, 36 South. 593, 104 Am. St. 452.

The reason for the rule must be either that the servant, by voluntarily encountering a known danger, assumes the risk, or that by so doing he is guilty of contributory

8. negligence as a matter of law. A servant by his contract agrees to assume all of the usual and ordinary risks incident to the employment which he undertakes. He also agrees to assume the risk of any known dangers that may arise during the course of such employment, even though such dangers are not usually incident thereto. It has accordingly been held that where a dangerous condition exists which renders it hazardous for the servant to perform his duties, and where the servant knows of such danger and voluntarily encounters it, he can not recover for injuries thereby occasioned, even though the danger so encountered was due to the master's negligence. Such

danger being known to the servant was one of the

9. risks assumed by him in his contract of employment,

Care on the part of the servant in encountering the danger or the want of such care is not material where the

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risk is assumed. It matters not how much care the servant may exercise. If the danger which causes the injury is one of the risks assumed, the most extreme care and caution on the part of the servant in encountering such danger, will not avail him or enable him to recover, and it makes no difference whether a safe way or a safer way of doing the work was open to him. In view of the well-settled

rule upon the question of assumption of risk, it would

7. seem that where a servant knows of dangers incident to doing a work in a particular way, and voluntarily undertakes to perform it that way instead of doing it in a safer way which was known to him, he should be denied a recovery for injuries sustained upon the ground that he assumed the risk of the known danger. This reason is given for the holding in some of the decided cases. 5 Thompson, Negligence §5372; *Fritz v. Salt Lake, etc., Co.* (1899), 18 Utah 493, 56 Pac. 90; *Richardson v. Carbon Hill Coal Co.* (1893), 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338. In many of the cases, however, the decision is placed squarely upon the ground of contributory negligence, and it is held that where a servant adopts a means of performing a service which he knows to be dangerous where a safe or a safer means was known and open to him, he will be denied a recovery upon the ground that such facts, as a matter of law, show him to be guilty of contributory negligence. *New York, etc., R. Co. v. Hamlin, supra*; *Consolidated Stone Co. v. Redmon, supra*; *Haven v. Pittsburgh, etc., Bridge Co.* (1892), 151 Pa. St. 620, 25 Atl. 311; *Newport News Pub. Co. v. Beaumeister, supra*.

If the question is to be determined by an application of the doctrine of assumption of risk, a recovery by the servant must be denied in every case where it appears that the injury resulted from a known danger, unless the case falls within some of the recognized exceptions to the rule, regardless of the care exercised by the servant; but if it is to be determined by an application of the doctrine of con-

tributory negligence, a recovery can not be denied solely on the ground that the injury resulted from a known danger. To bar a recovery on this ground, it must appear that the servant did not exercise reasonable care in view of the known danger and the circumstances of the case.

The question of whether an injured party was
10. guilty of negligence contributing to his injury, depends upon whether he was exercising reasonable care for his own safety at and immediately prior to such injury. Reasonable care is such care as a person of ordinary prudence would exercise under the condition and circumstances of the particular case, and it is usually a question of fact for the jury. Whether the doing of a

11. certain act, or the failure to do it, in a particular way, constitutes due care or the want of such care, should generally be left to the jury in the light of the evidence. It is only in cases where the facts are undisputed and where only a single inference can be reasonably drawn therefrom, that the court can say, as a matter of law, that a certain course of conduct does or does not constitute reasonable care. "It is only when the standard of duty is fixed and certain, or where the measure of duty is defined by law, and is the same under all circumstances, or when the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law and not of fact." *Town of Albion v. Hetrick* (1883), 90 Ind. 545, 547, 46 Am. Rep. 230. If we observe the rules of law above stated, it must follow that,

contributory negligence cannot, in all cases, be im-
12. puted to a servant from the mere fact that he chooses the more dangerous way or method of performing a duty when a safe method or one less dangerous was open to his choice. If, as a result of the choice, the servant exposes himself to dangers which are so obvious, imminent and glaring that no reasonable man exercising ordinary care for his own safety would have encountered them, and

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if there is no room for reasonable minds to differ upon the question, the court may properly say as a matter of law, that such conduct is negligent. In many cases, however, the question must be one of fact for the jury to be determined according to the circumstances of the case from a consideration of the reasons which prompted the servant to act and the care which he used to avoid the injury which befel him. 5 Thompson, Negligence §5374; *Brady v. Florence, etc., R. Co.* (1908), 44 Colo. 283, 98 Pac. 321; *Lewis v. Texas, etc., R. Co.* (1909), 57 Tex. Civ. App. 585, 122 S. W. 605; *Whitsett v. Chicago, etc., R. Co.* (1885), 67 Iowa 150, 25 N. W. 104; *Lewis v. Barton Salt Co.* (1910), 82 Kan. 163, 107 Pac. 783; *Daly v. American Printing Co.* (1891), 152 Mass. 581, 26 N. E. 135; *Taylor v. Felsing* (1896), 164 Ill. 331, 45 N. E. 161; *Florida Central, etc., R. Co. v. Mooney* (1898), 40 Fla. 17, 24 South. 148; *Haskel v. Cape, etc., Works* (1901), 178 Mass. 485, 59 N. E. 1113, 4 L. R. A. (N. S.) 220; *Atchison, etc., R. Co. v. Vincent* (1896), 56 Kan. 344, 43 Pac. 251; *Sayward v. Carlson* (1890), 1 Wash. 29, 23 Pac. 830; *Lyon v. Charleston, etc., R. Co.* (1908), 84 S. C. 364, 66 S. E. 282.

In the case of *Florida Central, etc., R. Co., v. Mooney, supra*, the court makes use of the following pertinent language: "If in the performance of his duties, two or more methods are open to him, and he has no instructions to pursue one in particular, he necessarily must choose between them, and he cannot be said to have been negligent if he in good faith adopts that which is more hazardous than another, provided the one pursued be one which reasonable and prudent persons would adopt under like circumstances. Any other rule would require the servant to be measured by the standard of very prudent persons, for only extremely cautious persons ordinarily adopt the least hazardous course where both are considered safe and appropriate. For this reason it cannot be held as a matter of law in all cases where a servant is injured while pursuing

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a method voluntarily adopted by him, more hazardous than other available methods, he is guilty of contributory negligence, for *non constat* the method pursued may be one which prudent persons would ordinarily exercise under like circumstances. Ordinarily the question of contributory negligence is one of fact for a jury under proper instructions from the court, and it is only in those cases where the conclusions and inferences to be drawn from facts in evidence are indisputable involving a common instinct of mankind—self-preservation—that it becomes a question of law.”

In cases where the danger created by the negligence of the master is one that can be assumed by the servant under his contract, and where the servant knowing of such danger voluntarily encounters it, the right of such servant to recover for injuries caused thereby can be determined by an application of the doctrine of assumption of risk. Where such facts appear, without dispute, the court may properly say as a matter of law that the servant assumed the risk; but in a case such as this, where the negligence charged against the master consists of the violation of a duty imposed by statute, the doctrine of assumption of risk can have no application. *Davis Coal Co. v. Pollard* (1902), 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319; *Narramore v. Cleveland, etc., R. Co.* (1899), 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; *Chamberlain v. Waymire, supra*; *Greenlee v. Southern R. Co.* (1898), 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. 734. Such cases must be determined by an application of the principle of law relating to contributory negligence.

If it appeared from the interrogatories in this case that the master had directed his servants to have their drills and other tools sharpened in the work room, and that the emery wheel in question had not been provided by him for the use of his servants in grinding their tools, and that he never authorized or directed them to use it, and that appellee without any authority from or direction by the mas-

ter had undertaken to sharpen his drill on an emery wheel not intended for such purpose, we think it would be clear that he should not recover. In such a case recovery would be properly denied upon the ground that he was acting without the scope of his employment, but this is not such a case. In this case the facts found by the jury

14. show that the emery wheel in question had been supplied by the master to appellee for the purpose of enabling him to sharpen his drills thereon. The wheel so supplied was suitable for that purpose, and the superintendent had directed appellee to use it. While a tool room was provided in which drills could be sharpened appellee had never been directed to have his drills sharpened there, and there was no general rule to that effect. Evidence may have been introduced to show that it was the custom of the employes in the shop to sharpen their drills upon this wheel. From the answers to interrogatories it appears that appellee was sharpening his drill in one of the ways provided by the master and we cannot say as a matter of law that a person of ordinary prudence would not under the circumstances have undertaken to sharpen his drill on the wheel in question. The question of contributory negligence was one for the jury notwithstanding appellee adopted a method for sharpening his drill which was attended with danger when a safe method could have been employed. The jury by its general verdict has decided that he acted with reasonable prudence in view of the circumstances and the answers to the interrogatories are not in irreconcilable conflict with the general verdict on this point.

Appellant contends that the court should have

15. granted a new trial. The first reason urged is that the verdict is not sustained by sufficient evidence. The argument of appellant is based upon the assumption that the complaint proceeds upon the theory that appellee at the time of his injury was acting in obedience to a particular direction or command of his employer requiring

him to sharpen the particular drill on the emery wheel in question, and that the evidence wholly fails to show any such instruction or requirement on the part of the master. As we construe the complaint, it proceeds upon the theory that appellee was employed by appellant as a machinist and that it was a part of his duties under such employment to keep his drills and other tools sharp by grinding them on the emery wheel in question which had been provided by the master for such purpose. To sustain this complaint it was not necessary for the evidence to show that any specific order or direction was given. The evidence does show that a part of appellee's work was to sharpen the drills with which he worked and that he had always sharpened all his tools in the shop and usually on this particular wheel; that the superintendent was frequently about and saw appellee grinding his tools on this wheel, and that on one occasion the superintendent specially directed appellee to grind a drill on this wheel. We think that the evidence is amply sufficient to show that appellee was acting within the scope of his employment at the time he received his injury.

It is also urged that the evidence shows that appellee was guilty of contributory negligence in choosing a dangerous way of sharpening his drill when a safe way had been provided by the master. We have discussed the legal phase of this question in passing upon the motion for judgment on the answers to interrogatories and it is not necessary to further discuss it here. We may say, however, that the evidence in this case shows that the way adopted by the servant was one of the ways provided by the master or, at least, a way recognized by him as a proper one. The facts and circumstances disclosed by the evidence were such as to warrant the court in submitting to the jury the question, and permitting it to decide whether or not, in view of the evidence, appellee acted with reasonable care and prudence. The fact that the servant chose a dangerous way provided by the master instead of a safe way

or a safer way also provided, is not conclusive upon the question of contributory negligence in a case such as this. This fact should be considered by the jury as bearing upon that question in connection with all of the other facts and circumstances tending to prove or to disprove due care. There is evidence in the record from which the jury was justified in finding that appellee was exercising ordinary care at the time he was injured.

The next contention is that there is no evidence
17. proving or tending to prove that the failure to provide an exhaust fan was the proximate cause of the injury, and that such fact can not be properly inferred from the evidence. The evidence shows that no exhaust fan was provided and that the injury was caused by a particle thrown off from the emery wheel while it was being operated by appellee. The evidence also shows that in the operation of an emery wheel particles are loosened and carried around the wheel and rebound from the front of the wheel upon coming in contact with the instrument being ground, and that an exhaust fan would not carry away all such particles, but would do so to some extent. The claim of appellant is that the evidence fails to show that the particle which produced the injury was one that would have been removed by an exhaust fan had one been provided. The evidence of L. W. Bradley is to the effect that an exhaust fan would take away the dust, the particles that fly off the wheel in grinding, the particles that drop down, and, to a certain extent, the particles which fly around the wheel and rebound. The evidence tends to prove that the injury to appellee's eye was caused by a very minute particle of burnt emery. It was for the jury to say from the evidence whether the particle which caused the injury would have been carried away by an exhaust fan and the injury thus prevented. In view of this evidence we think the jury might properly reach the conclusion that the failure to provide the exhaust fan was the proximate

cause of the injury. Any other holding would destroy the effect of the statute in a case such as this, for the reason that it would be impossible to establish with certainty that a proper exhaust fan would have carried away the particular particle which caused the injury. If it appeared from the evidence in a given case that an injury resulted from one or the other of two causes, for one of which the defendant was responsible, and for the other of which he was not, and if there were no evidence to show that the injury resulted from the cause for which such defendant was responsible rather than the one for which he was not, then the court might properly say that a verdict holding the defendant liable for such injury was not sustained by the evidence and that it was based upon a pure guess. The cases cited by appellant would be controlling in such a case. *Central Union Tel. Co. v. Swoveland* (1896), 14 Ind. App. 341, 42 N. E. 1035; *Gagan v. City of Janesville* (1900), 106 Wis. 662, 82 N. W. 558; *Hyer v. City of Janesville* (1898), 101 Wis. 371, 77 N. W. 729. In this case, however, there is evidence from which the jury may have properly found that the injury resulted from the cause for which defendant was responsible rather than the one for which he was not, and that an exhaust fan if provided, would have carried away the offending particle and prevented the injury. Absolute certainty is not required. The jury was called upon to decide this question according to the weight of the evidence and its finding on this point is not unwarranted. In the case of *Tucker & Dorsey Mfg. Co. v. Staley* (1907), 40 Ind. App. 63, 80 N. E. 975, Roby, J., speaking for this court said: "The purpose of the legislature in enacting the statute requiring dangerous machinery to be guarded was to prevent accident. Given, the absence of a proper guard and an injury to an employe coming in contact with a circular saw, the finding that the absence of such guard was the proximate cause of the injury was not unwarranted."

It was assigned as causes for a new trial that certain of

the answers to interrogatories are not supported by 18. any evidence, and this question is presented for decision. Even though it be true that a fact found by an answer to an interrogatory is not sustained by the evidence, this alone would not warrant the court in granting a new trial, unless such fact is one which is necessary to sustain the general verdict. If every fact necessary to sustain the general verdict is supported by evidence a new trial will not be granted because certain answers finding nonessential facts are not sustained by the evidence. It has been said that in cases where the answers to interrogatories were such as to indicate that the jury wholly disregarded the testimony and made answers so manifestly repugnant to each other as to indicate an intention to so distort the evidence as to make a case in favor of one party or the other regardless of the testimony, a new trial should be granted in the interest of justice. *Chicago, etc., R. Co. v. Kennington* (1890), 123 Ind. 409, 24 N. E. 137; *Chicago, etc., R. Co. v. Cobler* (1909), 172 Ind. 481, 87 N. E. 981; *South Shore Gas, etc., Co. v. Ambre* (1909), 44 Ind. App. 435, 87 N. E. 246. In this case the answers to interrogatories are not such as warrant the application of this rule. The facts necessary to support the general verdict are all sustained by evidence, and the facts found by the answers complained of were of such a character that the verdict can stand regardless of such answers. As an illustration, the jury finds in answer to interrogatory No. 23 that the tool room was not, at the time of the injury to appellee, supplied with a suitable appliance for sharpening drills. It makes no difference whether this fact is true or not, as the plaintiff could recover in either event. The other answers complained of are of the same character, and most if not all of such other answers have some evidence upon which they can rest.

It is also claimed in argument that the evidence shows that appellee was negligent in the treatment of his eye and

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hence was guilty of contributory negligence which
19. bars a recovery. Subsequent negligence of the injured party which tends to aggravate the injury may be considered as affecting the measure of damages, but it does not bar a recovery of such damages as were occasioned by the original injury. *Standard Oil Co. v. Bowker* (1895), 141 Ind. 12, 40 N. E. 128; *City of Goshen v. England* (1889), 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; *Brown v. Marshall* (1882), 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728; *Texas, etc., R. Co. v. McKenzie* (1902), 30 Tex. Civ. App. 293, 70 S. W. 237.

Appellant objects to several instructions given by
20. the court and to the refusal of the court to give several instructions tendered. By instruction No. 11 the court left it to the jury to say whether or not the particle which caused the injury was or was not of a size to be properly called "dust." The court by this instruction did not attempt to define "dust," nor did it undertake to say as a matter of law just how small or how fine particles of matter would have to be in order to be properly considered as "dust." The instruction is not open to the objection made to it. If appellant desired a definition of dust, he should have prepared and tendered an instruction containing a proper definition of the term. The court did not err in giving to the jury either instruction No. 23 or No. 32 complained of by appellant. We have carefully examined the instructions tendered by appellant and refused, and we are of the opinion that no available error was committed by the court in refusing to give any of these instructions.

Some of these instructions were properly refused be-
21. cause they did not accurately state the law; some were properly refused because the propositions of law contained therein were fully covered by other instructions given; and the answers to interrogatories show that the errors, if any, in refusing the other instructions were harmless.

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The court did not err in admitting testimony to
 22. prove that it was customary in the machine shop of
 appellant for the employes to sharpen their drills and
 other tools on the emery wheel at which appellee was work-
 ing when he received his injury. *Whitsett v. Chicago, etc.,
 R. Co.* (1885), 67 Iowa 150, 25 N. W. 104; *Pennsylvania
 Co. v. McCormack* (1892), 131 Ind. 250, 30 N. E. 27.

The motion of appellant for a new trial was properly
 overruled.

Judgment affirmed.

NOTE.—Reported in 98 N. E. 424. See, also, under (1) 26 Cyc. 1392; (2) 26 Cyc. 1134; (3) 38 Cyc. 1926; (4) 38 Cyc. 1924; (5) 38 Cyc. 1928; (6) 26 Cyc. 1513; 38 Cyc. 1927; (7) 26 Cyc. 1257; (8) 26 Cyc. 1180, 1196; (9) 26 Cyc. 1177; (10) 26 Cyc. 1231; (11) 29 Cyc. 640; (12) 26 Cyc. 1258; (13) 26 Cyc. 1180; (14) 26 Cyc. 1272, 1513; (15) 26 Cyc. 1088; (16) 26 Cyc. 1259; (17) 26 Cyc. 1442; (18) 29 Cyc. 815, 836; 38 Cyc. 1924; (19) 29 Cyc. 532; (20) 38 Cyc. 1688; (21) 38 Cyc. 1711; (22) 26 Cyc. 1441. As to contributory negligence as a question for the jury, see 8 Am. St. 849. As to assumption by servant of risk of employment, see 131 Am. St. 437. As to master's duty to furnish servant safe means and appliances to work with, see 92 Am. Dec. 213; 21 Am. Rep. 579. On the question of servant's assumption of risk of being injured by dust or splinters caused by the progress of the work, see 25 L. R. A. (N. S.) 364. As to servant's assumption of risk of injury by splinters flying off hammers, chisels, punches and similar tools, see 30 L. R. A. (N. S.) 800. For assumption of obvious risks of hazardous employment, see 1 L. R. A. (N. S.) 272.

EAST HILL CEMETERY COMPANY OF RUSHVILLE v. THOMPSON.

[No. 7,376. Filed March 28, 1912. Rehearing denied October 8, 1912. Transfer denied May 13, 1913.]

1. NEGLIGENCE.—*Complaint.*—*Sufficiency.*—*Trespassers.*—*Licensees.*
 —A complaint against a cemetery association for injuries on a defective bridge in the cemetery, charging that the injury was the result of the defendant's negligence, and that plaintiff was lawfully upon the grounds of defendant by and with the consent and invitation of defendant, sufficiently shows that plaintiff at the time of his injury was not a trespasser or a licensee. p. 420.

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2. **CEMETERIES.—Cemetery Associations.—Liability for Negligence.—“Business.”—“Charitable Association.”**—There is nothing in the act of June 17, 1852, 1 R. S. 1852 p. 458, providing for the organization of cemetery associations, that prohibits an association organized thereunder from conducting a business for profit, or from paying salaries to its officers, or dividends to its stockholders, so that, in an action against such an association for injuries resulting from its alleged negligence, an answer from which it appears that defendant was in the business of selling burial lots and maintaining a cemetery, although not for profit, is insufficient on the theory that defendant is a charitable and benevolent association, and therefore not liable for the negligence of its officers and agents, since the officers were not administering a charitable trust, but were conducting a business. p. 421.
3. **NEGLIGENCE.—Condition of Premises.—Obligation of Owner.**—A cemetery association operated as a business organization, although not for profit, owes a duty to one who is upon its premises by invitation arising out of a common interest or mutual advantage, and a failure to perform such duty is actionable negligence. p. 422.
4. **NEGLIGENCE.—Condition of Premises.—Obligation of Owner.**—A cemetery association owes no duty to a mere licensee upon its premises, except that of protecting him against active negligence. p. 422.
5. **NEGLIGENCE.—Injury While on Premises of Another.—Implied Invitation.**—Where an implied invitation is relied upon in an action for personal injuries sustained while on the premises of another, plaintiff must show that his entry on the premises was for a purpose connected with the business of the occupant, or which is carried on there, and must show some mutuality of interest in the object of his business, although the particular object may not be for the benefit of the occupant. p. 426.
6. **NEGLIGENCE.—Dangerous Condition of Premises.—Trespassers.—Licensees.**—A cemetery is not a public park, conducted and maintained for relaxation and enjoyment, and one, who is not a lot-owner and has no relatives buried therein, who enters therein through an open gate, for no purpose involving mutuality with the business or object of the cemetery association, but purely for inspection of the premises and for pleasure, while not a trespasser, is a mere licensee and therefore not entitled to recover for injuries due to the defective condition of the premises, even though his entry is pursuant to a rule of the association providing that the gates shall be open to visitors at reasonable hours. p. 427.

From Fayette Circuit Court; *Will M. Sparks*, Special Judge.

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Action by James A. Thompson against the East Hill Cemetery Company of Rushville. From a judgment for plaintiff, the defendant appeals. *Reversed.*

L. L. Broaddus, Douglas Morris and Watson, Titsworth & Green, for appellant.

Conner, Conner & Chrisman, J. F. Joyce and Smith, Cambern & Smith, for appellee.

ADAMS, J.—Action by appellee against the appellant, to recover damages for personal injuries, received while on the grounds of the appellant, through alleged negligence, in failing to keep in repair a certain bridge crossing a small stream in appellant's grounds. The appellee suffered a broken leg, and recovered judgment for \$3,000 in the court below. The complaint is in two paragraphs, the first alleging that the appellant is a voluntary association, doing business in Rush County, Indiana, pursuant to the laws of the State, as a cemetery company, selling lots, and making deeds therefor in the cemetery under its control. It is averred that on Sunday, September 3, 1905, the appellee was lawfully in and upon the grounds and premises of the appellant, by and with the consent and invitation of the appellant. The circumstances attending the injury, the negligence of the appellant, and the damages resulting therefrom are all averred and set out in detail. The second paragraph of the complaint is substantially the same as the first, with the additional averment that prior to the date of the accident, the appellant had passed and published certain rules and regulations, which rules were in full force on September 3, 1905, one of which provided that "the gates of the cemetery grounds will be open for lot holders and visitors at all reasonable hours."

The complaint was answered in two paragraphs, the second of which was in denial. In the first paragraph it is averred that the appellant was organized pursuant to the act of June 17, 1852. The articles of association are set out,

and it is averred that on July 15, 1859, the appellant purchased twenty acres of land, for the sum of \$1,300, the deed therefor containing a clause that the land so conveyed was to be held by the trustees of appellant and their successors in office in perpetuity for the purpose of a cemetery; that each lot holder is a member of the corporation, and entitled to vote in the selection of trustees. It is also averred that the association was organized for charitable and benevolent purposes; that its object was to provide a place for the burial of the dead, and to maintain and keep the same in repair forever; that no capital stock was ever issued, and that the corporation has never declared nor ever paid any dividends; that its only source of revenue has been from the sale of lots for burial purposes in the cemetery grounds; that the funds derived from such sales have always been used in purchasing additional lands for cemetery purposes, and in maintaining and keeping the cemetery grounds in repair; that the association has no power to assess lot owners for the purpose of maintaining the cemetery; that there are more than 700 members of the corporation, who are lot owners in said cemetery; that the trustees have never charged, nor received any compensation for their services in transacting the business of the corporation; that all of the personal property of the corporation and the proceeds of future sales of lots will be required in maintaining the cemetery in reasonable repair.

Demurrers were overruled to each paragraph of 1. complaint, and these rulings constitute the first errors assigned and argued by appellant. It will be noted that in each paragraph, it is averred that the injury was the result of the defendant's negligence, and that appellee "was lawfully in and upon the grounds and premises of the defendant by and with the consent and invitation of said defendant." We think these averments clearly show that the appellant at the time of his injury was not a tres-

passer or a licensee, and that a cause of action is stated in each paragraph of complaint.

Error is also assigned upon the sustaining of a 2. demurrer to the first paragraph of answer. It is urged that this answer shows the appellant to be a charitable and benevolent organization, and therefore not liable for the negligence of its officers or agents. While it is averred that the association was organized for the purpose of providing a place for the burial of the dead, and not for profit; that it has no capital stock, has never declared dividends, and that its trustees draw no compensation for their services, yet it does appear that the appellant is in the business of selling burial lots, and maintaining a cemetery. The answer shows commendable public spirit on the part of the officers and members of the appellant, but there is nothing in the articles of association or in the law under which the appellant was incorporated that forbids the conducting of a business for profit, the payment of salaries to its officers or dividends to its stockholders. The officers of appellant were not administering a charitable trust, they were conducting a business, and we think there was no error in sustaining the demurrer to this answer. The remaining errors relate to the action of the court in overruling the motion for a new trial. That the verdict is not sustained by sufficient evidence, and is contrary to law are among the causes assigned for a new trial. This appeal must, therefore, be determined upon the evidence.

The appellee testified that he had never been in the cemetery before the date of his injury; that in company with his wife, he went to the cemetery; that the main gate was open, and he entered; that he was not a lot owner, and had no relatives buried there; that his purpose in going was for inspection and pleasure; that he had no knowledge of the rules of the company relating to the admission of visitors; that he went upon the bridge where he was injured

in response to a call from his wife to come over on the other side. It is obvious that the controlling question is whether appellee was upon the grounds by the express or implied invitation of appellant, or was there as a mere licensee. If he was there by the invitation of the

3. appellant arising out of a common interest or mutual advantage between him and the appellant, then the latter owed him a duty, and failure to perform that duty would give appellee a right of action, and entitle him to recover for any damages sustained by reason of appellant's negligence. If, on the other hand, appellee was a

4. mere licensee, the appellant owed him no duty, except to protect him from active negligence, which is not in this case, and he could not recover, for the reason that where there is no duty, there is no actionable negligence.

The exact question raised by the admitted facts in this case is one of first impression in Indiana, but we have a number of decisions, which we think bear upon the principle here involved. In *Evansville, etc., R. Co. v. Griffin* (1885), 100 Ind. 221, 50 Am. Rep. 783, the court said: "The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often before been said, enjoys the license with its concomitant perils." In *Thiele v. McManus* (1891), 3 Ind. App. 132, 28 N. E. 327, the court, at page 134, said: "A complaint for personal injuries through negligence must show a legal duty or obligation of the defendant toward the person injured, existing at the time and place of the injury, which the defendant failed to perform or fulfil, and that the injury was occasioned by such failure. *Sweeney v. Old Colony, etc., R. Co.* [1865], 10 Allen [Mass.] 368, 87 Am. Dec. 644; *Evansville, etc., R. Co. v. Griffin* [1885], 100 Ind. 221,

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50 Am. Rep. 783; *City of Indianapolis v. Emmelman* [1886], 108 Ind. 530 [9 N. E. 155, 58 Am. Rep. 65]. Such a duty arises out of some relation existing at the time between the person injured and the defendant, which the complaint, by the averment of facts should show. The owner or occupant of premises is not under any legal duty to keep them free or safe from the danger of obstructions, pitfalls, excavations, trapdoors or openings in floors for persons who go upon, into or through the premises, not by his invitation, express or implied, but for their own pleasure or convenience, though by his acquiescence or permission, and who, therefore, are mere licensees. Such a visitor enjoys the license subject to the attendant risks. *Evansville, etc., R. Co. v. Griffin, supra*; *City of Indianapolis v. Emmelman, supra*; *Sisk v. Crump* [1887], 112 Ind. 504, [14 N. E. 381, 2 Am. St. 213]; *Indiana, etc., R. Co. v. Barnhart* [1888], 115 Ind. 399, [16 N. E. 121]; *Penso v. McCormick* [1890], 125 Ind. 116, [25 N. E. 156, 9 L. R. A. 313, 21 Am. St. 211]; *Schmidt v. Bauer* [(1889), 80 Cal. 565], 22 Pac. 256 [5 L. R. A. 580]; *Holmes v. Northeastern R. Co.* [1869], L. R. 4 Ex. 255; *Mathews v. Bensel* [1888], 51 N. J. L. 30 [16 Atl. 195].” Other Indiana cases in harmony with the general principle above announced are, *Chicago, etc., R. Co. v. Martin* (1903), 31 Ind. App. 308, 65 N. E. 591; *Martin v. Louisville, etc., Bridge Co.* (1908), 41 Ind. App. 493, 84 N. E. 360; *Beaning v. South Bend Electric Co.* (1910), 45 Ind. App. 261, 273, 90 N. E. 786; *Pittsburgh, etc., R. Co. v. Hall* (1910), 46 Ind. App. 219, 224, 90 N. E. 498, 91 N. E. 743; *Faris v. Hoberg* (1893), 134 Ind. 269, 33 N. E. 1028, 39 Am. St. 261; *Woodruff v. Bowen* (1893), 136 Ind. 431, 34 N. E. 1115, 22 L. R. A. 198; *Lingenfelter v. Baltimore, etc., R. Co.* (1900), 154 Ind. 49, 55 N. E. 1021; *Cleveland, etc., R. Co. v. Powers* (1909), 173 Ind. 105, 116, 88 N. E. 1073, 89 N. E. 485.

In the case last cited, the court said: “An invitation is implied where some benefit accrues or is supposed to accrue

to the party extending the invitation, or is in the interest of both parties, or consists in going upon premises upon the business of the owner.” The principle underlying the holdings in these cases has been declared in *Campbell, Negligence* §33, and quoted in *Bennett v. R. R. Company* (1881), 102 U. S. 577, 26 L. Ed. 235, wherein Mr. Justice Harlan, delivering the opinion of the court, said: “It is sometimes difficult to determine whether the circumstances make a case of invitation in the technical sense of the word, as used in a large number of adjudged cases, or only a case of mere license. ‘The principle’ says Mr. Campbell in his treatise on Negligence, ‘appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.’” Again in *Campbell, Negligence* (2d ed.) §33, it is said: “Invitation, therefore, in the technical sense of the word, as implied in this class of cases, differs from invitation in the ordinary sense—implying the relation between host and guest. In the case of host and guest, it would be thought hard that the hospitality of the former should expose him to the responsibility implied by business relations. The guest must take the premises as he finds them, with any risk owing to their disrepair; although a host is bound to warn his guest of any concealed danger upon the premises known to himself.”

In *Hart v. Cole* (1892), 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557, action was brought against the owner of a building, consisting of several tenements, the occupants of which used outside steps as a common means of access to their apartments. The plaintiff attended a wake in one of the apartments, the deceased person not being shown to have been an acquaintance of the plaintiff, or that she was expressly invited to the wake, or in any way related to the occupants of the house. Plaintiff was injured in passing down the steps, by a defect therein. The court held that

the plaintiff was not on the defendant's premises by an invitation, express or implied, but that she was a mere licensee, and could not recover. At page 479, the court says: "Whatever ground there may be for holding that there is an invitation to relatives or near friends, there is no evidence to warrant the application of such a rule in this case; and there is no evidence, and there are no facts of common knowledge, to support it in reference to strangers. It may be true that strangers to a deceased person and to his family sometimes go to a dwelling-house and attend his wake or his funeral. But, in the absence of clear proof to support the contrary view, it must be held that such persons are mere licensees; and that the family of the deceased person in having a funeral or wake in their dwelling-house, do not invite the whole world to come there." In *Larmore v. Crown Point Iron Co.* (1886), 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718, an injury sustained from defective machinery by one who visited a coal shaft to secure employment, was held to create no liability, the visitor being but a licensee. In *Norris v. Hugh Nawn Contr. Co.* (1910), 206 Mass. 58, 91 N. E. 886, 31 L. R. A. (N. S.) 623, 19 Ann. Cas. 424, it was held that a newsboy who was permitted to go into a quarry to sell papers to the workmen and was injured, was a licensee, and could not recover for the negligence of the company. In *Converse v. Walker* (1883), 30 Hun 596, it was held that one who took refuge in an hotel to escape a thunderstorm, and was injured by a defective balcony, was but a licensee, and could not recover. In *Bedell v. Berkey* (1889), 76 Mich. 435, 43 N. W. 308, 15 Am. St. 370, it was held that a person visiting a store on business, which would imply an invitation, but was injured by falling into an open elevator shaft while strolling about the premises at his own will, could not recover.

In the leading case of *Plummer v. Dill* (1892), 156 Mass. 426, 31 N. E. 128, 32 Am. St. 463, it was held that where one goes to a building for his own convenience upon a mat-

ter which concerns himself alone, and not for the purpose of transacting business with any occupant, nor in the transaction of business for which the building is used, is a mere licensee, and cannot recover for injuries received on account of the unsafe and dangerous condition of the premises. In the opinion, at page 427, it is said: "If the place is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. The mere fact that the premises are fitted conveniently for use by the owner and his tenants, and by those who come to transact such business as is carried on there, does not constitute an implied invitation to strangers to come and use the place for purposes of their own. To such persons it gives no more than an implied license to come for any proper purpose."

The English rule is that where the relation of host and guest obtains, where one comes upon an express invitation to enjoy the hospitality of another, he must take the house as he finds it and his right to recover for an injury occasioned by defects in the house is no greater than that of a mere licensee. *Southcote v. Stanley* (1856), 1 Hurl. & N. *247. This is clearly upon the principle that where the guest is receiving gratuitous favors, there is no duty to make the place where the hospitality is tendered safer for the guest than it is for the host. But in a case like 5. the one at bar, where no question of hospitality is involved, where an implied invitation is relied on, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which is carried on in the place visited. There must be some mutuality of interest in the object of the visitor's business, although the particular object may not be for the benefit of the occupant. Pollock, Torts (6th ed.) 492.

In the case of *George v. Cypress Hill Cemetery Co.* (1898), 52 N. Y. Supp. 1097, 32 App. Div. 281, 4 Am. Neg. Rep. 696,

East Hill Cemetery Co. v. Thompson—53 Ind. App. 417.

cited and relied upon by appellee, it is held that “A
6. rural cemetery association, organized under the
Laws of 1847, so far from being a charitable
institution is a mere coöperative association for the
purpose of providing and maintaining a burial place with
the least possible cost to the individual, and is as strictly a
business transaction, dictated by business principles, as any
other enterprise in which the individual may be engaged.”
Assuming this to be true, it necessarily follows that a ceme-
tery association, being strictly a business organization, must
be governed by the rules of law which obtain with reference
to other business organizations, and, therefore, the Indiana
cases herein cited must be deemed to be in point. In the
George case cited, the plaintiff was injured while planting
flowers on the grave of her deceased husband. Likewise
in the case of *Dutton v. Greenwood Cemetery Co.* (1903),
80 N. Y. Supp. 780, 80 App. Div. 352, the injury was sus-
tained at a time when the plaintiff and his family were visit-
ing the grave of a deceased member of the family, and his
right to recover for injuries received through the negligence
of the defendant is unquestioned. To the same effect is the
case of *Donnelly v. Boston Catholic Cemetery Assn.* (1888),
146 Mass. 163, 15 N. E. 505, cited and relied upon by ap-
pellee. But the principle ruling in these cases is not wide
enough to include a case where one is not a lot owner, who
has no personal interest in the cemetery, who has no friends
or relatives buried there, but who goes upon the grounds
for his own pleasure, because he finds the gate open.

There is a line of cases, of which *Sweeney v. Old Colony, etc., R. Co., supra*, is a leading one, in which it is held that
an implied invitation may arise by inducement. In that
case, however, the inducement arose by a flagman at a rail-
road crossing signalling a traveler, who was using due care,
to cross the track, resulting in an injury, due to the negli-
gence of the flagman. Again in *Holmes v. Drew* (1889),
151 Mass. 578, 25 N. E. 22, the inducement arose by the

building of a sidewalk upon private property, connecting at both ends with public sidewalks. This was held to be an inducement to the public to use the private way. There was no such inducement shown in the case at bar. It cannot be said that the beauty of the cemetery in and of itself constituted an inducement and an implied invitation to the public generally. Its beauty is rather a tribute of affection from the living to the dead, and is not designed as an allurement to those who go there from no motive of interest or sentiment, but from idle curiosity and to gratify a desire for diversion and pleasure. A cemetery is not a public park, conducted and maintained for relaxation and enjoyment. It is God's Acre; it is a sacred place hallowed by memories of those who sleep therein. No finer or more ennobling sentiment affects and colors the composite life of a people than that which enjoins respect and reverence for the city of the dead. But even if the appellee was a visitor within the meaning of the rule of the association that "the gates of the cemetery will be open for lot holders and visitors at all reasonable hours," and that he entered the grounds on account of the rule, which the evidence does not show, still, it cannot be said that his entry was upon an implied invitation of the appellant. Had appellee opened the gate and entered, he would clearly have been a trespasser, but by entering through the open gate, for no purpose involving mutuality with the business or object of the association, he did not become an invitee but a licensee. The open gate was not an invitation, but a permit to be enjoyed with its concomitant perils. By entering as he did, appellee violated no rule, and was in a place where he had a right to be, but he took the place as he found it, and no duty was owing him by the association, except to protect him from wilful injury. Under the admitted facts in this case, and upon the authority herein quoted and cited, we are constrained to hold that the appellee was upon the grounds of the appellant at the time of his injury by the

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permission, and not by the invitation of the appellant. He was, therefore, a mere licensee, and as such is not entitled to recover for any injuries growing out of the negligence charged. This being true, it follows that the verdict of the jury was not sustained by the evidence, and is contrary to law.

The judgment is reversed, with instructions to the court below to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

NOTE.—Reported in 97 N. E. 1036. See, also under (1) 29 Cyc. 567; (2) 6 Cyc. 975; 6 Cyc. Anno. 975; (3) 29 Cyc. 455; (4) 29 Cyc. 449; (5) 29 Cyc. 454; (6) 29 Cyc. 451. As to general nature of parol license to use land, see 31 Am. St. 713. As to landowner's liability to person injured by reason of bad state of premises, see 31 Am. St. 524. As to the duty of an owner of premises to protect licensee against hidden dangers, see 17 L. R. A. (N. S.) 916. On the liability to trespasser or bare licensee from active as distinguished from passive negligence, see 36 L. R. A. (N. S.) 492.

MANUFACTURERS MUTUAL FIRE INSURANCE COMPANY v. SWANEY ET AL.

[No. 7,912. Filed May 13, 1913.]

1. **APPEAL.—Review.—Harmless Error.—Objections to Complaint.**—An appellant, against whom no judgment was rendered on the complaint, appealing from a judgment against himself in favor of a codefendant on a cross-complaint, cannot avail himself of objections to the sufficiency of the complaint. p. 432.
2. **APPEAL.—Remitting of Verdict.—Right to Complain.**—An appellant cannot complain of the remitting of the verdict against it. p. 432.
3. **INSURANCE.—Fire Insurance.—Complaint.—Sufficiency.**—A complaint on a fire policy alleging that on a certain day the insured "gave the defendant company due notice of proof of said fire and also he has duly performed on his part all the conditions required by said policy of insurance," sufficiently avers a performance of the conditions of the policy. p. 432.

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4. **INSURANCE.—Fire Insurance.—Complaint.—Sufficiency.—Initial Attack on Appeal.**—In an action on a fire insurance policy, the complaint alleging that on a certain day the insured was the owner of certain property and that defendant on that day executed and delivered a policy of insurance thereon, and that a number of days thereafter the property was destroyed by fire, though perhaps insufficient to withstand a demurrer for failure to directly aver that insured was the owner of the property at the time of the fire, is sufficient as against objection presented for the first time on appeal. p. 433.
5. **PLEADING.—Complaint.—Sufficiency.—Aider by Verdict and Judgment.**—Where the defects in a complaint are such as to render it insufficient to withstand a demurrer, but no attack by demurrer is made, such defects are deemed cured by the verdict and judgment, if they were such as could be obviated by evidence. p. 434.
6. **APPEAL.—Questions Reviewable.—Party Entitled to Complain.**—An appellant, against whom no judgment was rendered on the complaint and whose appeal is from a judgment rendered on the cross-complaint of a codefendant, cannot complain of alleged error in sustaining a demurrer to his answer to such complaint. p. 434.
7. **INSURANCE.—Fire Insurance.—Stipulations Against Incumbrances.—Evidence.**—Evidence showing that there was a real estate mortgage on the property at the time it was insured, but failing to show that the property was at any time encumbered by a chattel mortgage, or that it was encumbered subsequently to the issuing of the policy by a real estate mortgage, is insufficient to show a cancellation of a policy containing a provision that “any subsequent mortgage or encumbrance on any property insured under this policy, unless consent of the company is endorsed hereon, cancels and annuls this policy absolutely, * * * or if the subject of insurance be personal property and be or become encumbered by chattel mortgage.” p. 434.
8. **INSURANCE.—Fire Insurance.—Stipulations Against Incumbrances.—Waiver.**—Where there is no written application for insurance, and no questions are asked, and no statements are made by the insured, and he has no knowledge that the existence of a mortgage will avoid the policy, the issuance of the policy is a waiver of the provisions for forfeiture by reason of existing incumbrances. p. 435.
9. **INSURANCE.—Fire Insurance.—Stipulations Against Assignment.—Operation.**—The provision of a fire policy against assignment before a loss, is not violated unless there has been a transfer, either in writing or by actual delivery, and in the absence of such

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a transfer, the mere promise of the assured before a loss to assign the policy, together with his statement after the loss that he had assigned same, will not avoid the policy. p. 435.

From Monroe Circuit Court; *James B. Wilson*, Judge.

Action by Laura A. Swaney against the Manufacturers Mutual Fire Insurance Company and Elva Pafford. From a judgment against the Insurance Company on the cross-complaint of its codefendant, Pafford, and subrogating plaintiff to his rights to the amount of her claim, the defendant Insurance Company appeals. *Affirmed*.

Ulric Z. Wiley and *Arthur H. Jones*, for appellant.

Batman, Miller & Blair and *Miers & Corr*, for appellees.

IBACH, C. J.—This was an action by appellee Swaney to be subrogated to the rights of appellee Pafford to the extent of \$500 in an insurance policy issued by appellant to Pafford, she having paid off a mortgage on the insured property, and demanding judgment against appellee Pafford and appellant. Mrs. Swaney had been the owner of the mortgaged property, and had sold it to Pafford, who assumed the mortgage and promised to assign the insurance policy to Mrs. Swaney or the holder of the mortgage in order to secure her. When the mortgage became due Pafford refused to pay it, and Mrs. Swaney, in order to prevent being sued on the mortgage, paid it off, relying on Pafford's statement that he had assigned an interest of \$400 in the policy to the owner of the mortgage debt. Pafford by way of cross-complaint sought to recover against appellant on the same insurance policy, alleging the total destruction by fire of the property insured, and that he was entitled to recover the full amount of the policy, \$1,000. A verdict was returned by the jury in favor of appellee Swaney against appellant. Appellee Swaney remitted the verdict against appellant. Judgment was rendered that Pafford recover from appellant \$1,000 and his costs and charges expended

on his cross-complaint, that Mrs. Swaney recover of Pafford, \$400 and her costs in the action, and it was "further ordered and adjudged and decreed by the court that said plaintiff be and she is hereby subrogated to the right of said Elva Pafford in the judgment rendered in his favor herein against the Manufacturers Mutual Fire Insurance Company for \$1,000, to the amount of \$400 thereof, and \$400 of said judgment shall be and hereby is declared to be for the use and benefit of the plaintiff, and is hereby declared to belong to plaintiff, and upon the payment of said \$1,000 by said defendant insurance company to the clerk of this court, said plaintiff is hereby authorized to receipt for \$400 of the same and enter satisfaction thereof for said \$400, which shall be a full satisfaction and discharge of said judgment to that extent."

Appellant has made certain objections to appellee

1. Swaney's complaint and supplemental complaint.

These objections are unavailing, for no judgment was rendered in favor of appellee Swaney against appel-

2. lant, and consequently, if there was any error in the proceedings between her and Pafford, appellant was not harmed, and could not complain.

Appellant cannot complain of the remitting of the verdict against it. *Kelley v. Kelley* (1894), 8 Ind. App. 606, 34 N. E. 1009.

No demurrer was filed to Pafford's cross-complaint, but appellant has assigned as error that it does not state facts sufficient to constitute a cause of action against

3. appellant. The allegation of the performance of the conditions of the contract by Pafford is in the following words, "that on March 20, 1909, this defendant gave the defendant company due notice of proof of said fire and also he has duly performed on his part all the conditions required by said policy of insurance." Appellant contends that this averment is merely that he gave

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notice of having performed the conditions of the policy, and that it does not state that he did perform such conditions. This contention, which depends mainly upon the fact that there is no comma between the words "fire" and "and," is hypercritical, is not a reasonable construction of the averments of the pleading, and would do violence to the grammatical construction of the sentence.

It is averred in the cross-complaint that Pafford on February 1, 1909, was the owner of certain real estate situated in Monroe County, Indiana, on which was situated
4. a steam flour mill, and in which was situated certain mill machinery, of all of which he was the owner; that on said day in consideration of the sum of \$45 paid by Pafford to the defendant insurance company as a premium, it executed and delivered to him a policy of insurance on all of said property for \$1,000; that on February 18, 1909, the said mill building, machinery therein and connected therewith as described in said policy was burned and wholly destroyed by fire. Thus it will be apparent that this pleading does not directly aver that Pafford was the owner of the property at the time of the fire, but only that he was the owner when it was insured, some eighteen days before the fire. Appellant urges that it is absolutely essential to the sufficiency of a pleading predicated upon an insurance policy, seeking to recover damages by reason of loss by fire, to allege that the pleader was the owner of the property destroyed at the time of the destruction. To this appellee replies by citing the rule of law that where ownership is shown to exist at a certain time, the presumption is that it continues until the contrary appears. The cases cited by appellee are not, however, cases where an action was brought on a policy of insurance, except that of *Phenix Ins. Co. v. Pickel* (1889), 119 Ind. 155, 158, 21 N. E. 546, 12 Am. St. 393, and in that case the averments of ownership at the time the policy was issued were aided by

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other averments which inferentially showed ownership at the time of the loss. The rule is, however, that where a complaint is not attacked in the trial court, and its defects, even though they might be fatal to its sufficiency if tested by demurrer, are such as may be obviated by evidence, they are cured by a verdict and judgment. *Burkett v. Holman* (1885), 104 Ind. 6, 3 N. E. 406; *Indianapolis, etc., R. Co. v. McCaffery* (1880), 72 Ind. 294; *Roberts v. Porter* (1881), 78 Ind. 130; *Bronnenburg v. Rinker* (1891), 2 Ind. App. 391, 28 N. E. 568; *Town of Monticello v. Kennard* (1893), 7 Ind. App. 135, 34 N. E. 454; *Harter v. Parsons* (1896), 14 Ind. App. 331, 42 N. E. 1025.

Appellant's objection to the cross-complaint might have been well taken if presented by demurrer. But against an objection presented here for the first time, we must regard such a deficiency as that urged, to have been cured by the evidence and the verdict. The evidence showed that Pafford was the owner at the time of the fire.

It is also contended that the court erred in sustaining the demurrer of appellee Swaney as to appellant's second paragraph of answer, but, as we have said before, since appellee Swaney recovered no judgment against appellant, appellant can here take no advantage had there been an erroneous ruling in her favor.

The policy contained the following provision relating to encumbrances, "It is understood that any subsequent mortgage or encumbrance on any property insured under this policy unless consent of the company is endorsed hereon, cancels and annuls this policy absolutely, * * * or if the subject of insurance be personal property and be or become encumbered by chattel mortgage." The evidence shows that there was a real estate mortgage on the property at the time the policy was issued. It does not show that the property was at any time encumbered by a

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chattel mortgage, or that it was encumbered subsequently to the issuing of the policy by a real estate mortgage. It is only a subsequent real estate mortgage, or an existing chattel mortgage which will cancel the policy, according to its terms. Therefore the court did not err when he instructed the jury that there was a failure on the part of the defendant to prove that the policy was cancelled under the above provision because of the existence of the real estate mortgage given previously to the time when the policy was issued.

By the third paragraph of answer appellant pleaded that the policy is void by its provisions if the insured misrepresents any fact material to the risk, and that appellee

8. Pafford misrepresented that the property was free and unencumbered, and that appellant relying on such statement, issued the policy. The evidence shows that Pafford made no statements or representations as to any mortgage on the property, and was not asked to do so. Where there is no written application for insurance, and no questions asked, and no statements made by the insured, and no knowledge by him that the existence of a mortgage would avoid a policy, the company is deemed by issuing the policy to have waived the provisions for forfeiture by reason of existing encumbrances. *Glens Falls Ins. Co. v. Michael* (1907), 167 Ind. 659, 678, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *German Mut. Ins. Co. v. Niewedde* (1895), 11 Ind. App. 624, 39 N. E. 534; *Continental Ins. Co. v. Munns* (1889), 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430. But in the present case there was not even a provision against existing real estate mortgages.

Another provision of the policy was, that, if the policy should be assigned before a loss, then it would become void.

Appellant by its fourth paragraph of answer pleaded

9. that the policy was under this provision void, because it had been assigned to Mrs. Swaney before the fire. The court instructed the jury that it was a question

of fact for its determination whether Pafford assigned the policy to Mrs. Swaney before the fire; that he could assign the policy in two ways, by written assignment, or by delivering to her the policy on an agreement vesting the title thereto in her, in either case vesting in her the right to maintain an action thereon; that if he simply promised that he would get the property insured and would assign her the policy, or if he afterwards said that he had assigned the policy, neither nor both would constitute an assignment of the policy, but to constitute an assignment there must be an actual transfer, either by actual delivery, or in writing; that if he promised to assign the policy and afterwards said he had assigned it, that would not constitute such an assignment as would avoid the policy, but would simply show a failure on Pafford's part to do what he said he would do, which would in no way invalidate the policy or be such an act of Pafford's as would avail the defendant in this suit; that the answer alleges assignment of the policy by Pafford to Mrs. Swaney, and that proof of an agreement to assign said policy to Dill, or a statement of Pafford subsequently made that he had assigned the policy to Dill would be a variance, would not sustain the answer, and would not avoid the policy. We think that these instructions stated the law correctly. The following authorities sustain generally the position that a promise to assign a policy and a subsequent statement that the policy had been assigned, when there was no legal assignment, would not avoid the policy. *Lazarus v. Commonwealth Ins. Co.* (1827), 22 Mass. 76; *Griffey v. New York Cent. Ins. Co.* (1885), 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; *Mahr v. Bartlett* (1889), 53 Hun 388, 7 N. Y. Supp. 143.

No error appears, and the judgment is affirmed.

NOTE.—Reported in 101 N. E. 843. See, also, under (1, 6) 3 Cyc. 233; (2) 3 Cyc. 234; (3) 19 Cyc. 921; (4) 31 Cyc. 720, 769; (7) 19 Cyc. 756, 815; (8) 19 Cyc. 815; (9) 19 Cyc. 637. As to what judgments and orders may be appealed from, see 20 Am. St. 173. As

to what increase of hazard amounts to forfeiture of fire policy, see 66 Am. St. 691. As to what constitutes assignment of insurance and when is such valid, see 56 Am. Dec. 747. On the question of mortgage as affecting change of title or interest in insured property, see 38 L. R. A. 562.

TURNER v. HAMMERLE.

[No. 8,036. Filed May 13, 1913.]

1. DESCENT AND DISTRIBUTION.—*Rights of Surviving Wife.—Estates Under Five Hundred Dollars.*—Under §§2943-2946 Burns 1908, §§2419 and 2422 R. S. 1881, Acts 1903 p. 145, providing for the vesting in the widow of the estate of her deceased husband, where the same is worth less than \$500, the rights of a widow, who has complied with all the conditions imposed by the statute and has procured a decree vesting title in her, are not affected by an outstanding judgment for tort against the decedent, on which an execution had been issued and served in the lifetime of decedent, since the statute specifically provides that a widow in acquiring property thereunder shall not be liable for any of decedent's debts, except mortgages of real estate and the expenses of his last sickness and funeral. p. 438.

From Probate Court of Marion County (10,356); *Frank B. Ross*, Judge.

Proceedings by Katherine Hammerle, widow of Peter Hammerle, deceased, to have the estate of decedent vested in her as worth less than \$500. From a judgment vesting the estate in such widow, and denying the application of Alma E. Turner, a judgment creditor of decedent, for a reappraisement, this appeal is prosecuted. *Affirmed.*

Frank M. Hay, Frank C. Starkey and Charles A. Slinger, for appellant.

John P. Leyendecker, for appellee.

ADAMS, J.—Appellee, as the widow of Peter Hammerle, filed her petition to have the estate of her late husband vested in her, pursuant to §§2943-2946 Burns 1908, §2419 R. S. 1881, Acts 1903 p. 145, §2422 R. S. 1881. Ap-

praisers were appointed, and returned an inventory and appraisement, showing the entire estate to be worth less than \$500. Appellant, as a judgment creditor of Peter Hammerle, asked for a reappraisement, which, when made and returned, still disclosed an estate worth less than \$500. Appellant then filed a verified motion and petition for the appointment of an administrator. The motion was overruled, and the court entered a decree vesting the estate in appellee. This ruling is complained of as error.

In her petition for the appointment of an administrator, appellant showed that she was the owner of a judgment in tort for \$750, rendered against Peter Hammerle; that

1. execution had been issued on the judgment and served on said Peter Hammerle shortly before his death.

Appellant insists that as her judgment became a lien on the property which appellee asked to have set off to her, and as said property might have been sold as the property of Peter Hammerle, without the privilege of exemption, it must follow that her lien cannot be divested by the death of the judgment debtor. There is no merit in this contention. The statute which provides an exemption from sale on judgments arising out of contract, to the extent of \$600 in value to resident householders, bears no relation to the statute giving to a widow, under certain conditions, the entire estate of her husband, where the same is worth less than \$500. When a widow has complied with all the conditions imposed by law, and the court has entered a decree vesting in her the title to such estate, then, by the terms of the statute, "such widow shall not be liable for any of the decedent's debts, except mortgages of real estate, but she shall pay and may be sued for reasonable funeral expenses of the deceased and expenses of his last sickness." §2946 Burns 1908, *supra*. The words of the statute are plain and unambiguous. There is no room for construction. A judgment in tort is not one of the debts enumerated which the widow is bound to pay, and as she is discharged from the payment of all debts other

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than those named, she is not liable personally, nor is her property liable for the payment of appellant's judgment. The court did not err in denying the petition for the appointment of an administrator.

The judgment is affirmed.

NOTE.—Reported in 101 N. E. 827. See, also, 18 Cyc. 383, 387. As to liability of heirs and devisees for debts of ancestors and devisors, see 112 Am. St. 727.

ST. JOSEPH VALLEY RAILROAD COMPANY v. RABER & LANG MANUFACTURING COMPANY ET AL.

[No. 7,928. Filed May 14, 1913.]

1. **APPEAL.—Questions Presented.—Briefs.—Requisites.**—The errors relied on for reversal must be pointed out in appellant's brief in accordance with Rule 22 of the Supreme and Appellate Courts. p. 439.
2. **APPEAL.—Review.—Judgment.—Presumptions.**—The court will not search the record for error, and, none being shown by appellant, will presume that the judgment is correct. p. 440.

From Dekalb Circuit Court; *Emmett A. Brattan*, Judge.

Action between the St. Joseph Valley Railroad Company and the Raber & Lang Manufacturing Company and another. From a judgment for the latter, the former appeals. *Affirmed.*

John G. Yeagley and *P. V. Hoffman*, for appellant.

Link & Atkinson and *Leonard, Rose & Zollars*, for appellee.

LAIRY, J.—Many of the alleged errors by which appellant seeks to reverse the judgment of the trial court are not so presented in the briefs as to require consideration.

1. It is well settled that the errors relied on for reversal must be pointed out by the brief of appellant in accordance with Rule 22 of the Supreme and Appellate Courts. The judgment of the trial court is presumed to be correct and this court will never search the record to find

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a cause for reversal. *Chicago, etc., R. Co. v. Pritchard* (1907), 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857; *Webster v. Bligh* (1912), 50 Ind. App. 56, 98 N. E. 73. The brief of appellant as originally filed failed to set out a copy of the motion for a new trial or to give its substance. By permission of the court the brief has been amended in this respect, but it still falls far short of a compliance with the rule. Appellant's brief may be considered as properly presenting some of the questions relied on for reversal, and these we have carefully examined. We think, however, that no good purpose would be served by a separate discussion of each question. The opinion might be so prepared as to point out the questions which are not properly presented and might point out wherein the briefs fail in this respect. It might then take up the questions raised and separately dispose of them by showing either that no error was committed in the ruling complained of, or that the error was not prejudicial. Such a course would, however, unnecessarily extend this opinion, owing to the numerous questions sought to be presented, and would involve a reiteration of well-settled propositions of law often announced and applied by the courts of appeal of this State. It would be of no value to the profession and would afford little satisfaction to the litigants. So far as disclosed by the briefs the case appears to have been fairly tried upon its merits.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 832. See, also, under (1) 2 Cyc. 1014; (2) 3 Cyc. 275. As to the effect of appeal or of right of appeal on judgment as *res adjudicata*, see 37 Am. St. 29.

ROSE v. ROSE, GUARDIAN.

[No. 7,949. Filed May 14, 1913.]

1. **DRUNKARDS.—Guardians.—Discharge of Guardian.—Discretion of Court.—Statutes.**—Under §6177 Burns 1908, §4320 R. S. 1881, providing that upon the application of a drunkard, who is under guardianship, his property shall be restored and the guardian discharged, if such applicant shall show to the court by satisfactory evidence that he has reformed and has voluntarily refrained from the use of intoxicating liquors for at least one year preceding the application, some discretionary power is vested in the court to determine whether it has been satisfactorily shown that the inebriate has reformed and has voluntarily refrained from the use of liquor for at least one year preceding the application. p. 443.
2. **DRUNKARDS.—Discharge of Guardian.—Reformation.**—The reformation contemplated by §6177 Burns 1908, §4320 R. S. 1881, providing for the discharge of the guardian of an habitual drunkard on a proper showing that the inebriate has reformed, is none other than that of a good faith reformation of the inebriate in his use of intoxicating liquors, and is shown by satisfactory evidence that he has in fact been led to see and realize the importance of controlling his appetite for liquor, and that by his total abstinence for the period relied on he has evidenced both a good faith desire and ability to continue to refrain from the use of such liquors. p. 444.
3. **DRUNKARDS.—Application for Discharge of Guardian.—Evidence.—Discretion of Court.**—Although the evidence on the application of a drunkard to have his property restored and the guardian discharged, showed that he had refrained from drinking for a period of about a year and a half prior to the trial of the cause, the court did not abuse its discretion in denying the application, where the interrogation of the applicant by the court developed facts tending to show that he had once before refrained from drinking for about a year and then commenced again. p. 444.
4. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—The error, if any, on the application of a drunkard for the discharge of his guardian, in permitting questions to be propounded relative to the applicant's moral character, and the character of his place of business, was harmless, where the record discloses that none of the witnesses testified to any immorality, violence or vice on the part of the appellant for a period of a year and a half. p. 445.

From Vanderburgh Circuit Court; *A. C. Hawkins*, Judge *Pro Tem*.

Action by James L. Rose against Henry L. Rose, his guardian, for the restoration of his property and the discharge of such guardian. From a judgment denying the relief and continuing the guardianship, the plaintiff appeals. *Affirmed*.

Edgar Durre and *Clifford T. Curry*, for appellant.

George A. Cunningham, for appellee.

HOTTEL, J.—This is an action based on §6177 Burns 1908, §4320 R. S. 1881. The facts shown by appellant's verified petition are in substance as follows: At the September term, 1897, of the Vanderburgh Circuit Court, appellant was placed under guardianship, under §6175 Burns 1908, §4318 R. S. 1881, on account of the fact that he was an habitual drunkard and appellee was appointed his guardian. At the time appellant filed his petition herein more than one year had elapsed since such appointment, and appellant no longer suffered from the infirmity of inebriacy; but had reformed and voluntarily refrained from the use of intoxicating liquors for more than one year and was fully capable of managing his own property and estate, and there was no need for the continuation of such guardianship. Summons was duly issued for the guardian, and attorneys appeared for the wife of the appellant but filed no answer or other pleading. The cause was tried by the court and after having heard the evidence, the court denied the restoration of the property and continued the guardianship. Motion for new trial was overruled and this ruling is assigned as error. Several grounds for new trial are stated in the motion therefor, but those urged and relied on for reversal relate to the admission of evidence and to the sufficiency of the evidence to sustain the decision.

The real question presented by the appeal, turns on the construction to be given to §6177 Burns 1908, *supra*, which

is as follows: "If, at any time after one year from

1. the appointment of such guardian, such person shall make application to such court to have his property restored to him and such guardian discharged, and shall show to the court, by satisfactory evidence, that he has reformed, and has voluntarily refrained from the use of intoxicating liquors for at least one year preceding such application, such court shall order his property restored to him and such guardian discharged upon making proper settlement with the court."

It is insisted by the appellant that this section is mandatory and requires the trial court in such case to restore the property where the undisputed evidence shows that the petitioner has voluntarily refrained from the use of intoxicating liquor for more than one year. We have been unable to find any construction of such statute by either of the courts of appeal of this State, but we think its language indicates an intention on the part of the legislature to lodge some discretionary power with the trial court called upon to determine whether the inebriate should have restored to him the control of his property. Before it is authorized to restore such control, such court must be shown by *satisfactory evidence* that the inebriate *has reformed* and has voluntarily refrained from the use of intoxicating liquor for *at least one year* preceding such application. We think it clear that this language imports an intention on the part of the legislature to deprive the trial court of any discretionary power in the matter of restoring such property within the year after the appointment of such guardian, but the words "*at least*" used in the connection in which they are, make equally clear an intention to give to such court some discretionary power after the expiration of the year. The petitioner in such case does not comply with the terms of the statute by simply showing that he has voluntarily refrained from the use of liquor for the period mentioned, but he must also show by *satisfactory evidence* that he has *reformed*.

We do not mean to be understood as holding or indicating that any reformation is contemplated by the section of statute involved, other than that of a good faith reformation of the inebriate in his use of intoxicating liquors,

2. but such court must be shown by satisfactory evidence that the inebriate has in fact been led to see and realize the importance of controlling his appetite for liquor, and that by his total abstinence for the period relied on, he has evidenced both a good faith desire and ability to continue to refrain from the use of such liquors.

It is insisted by counsel for appellant that even if it be conceded that the statute involved lodges in the trial court a discretionary power, that the undisputed evidence

3. in this case shows that there has been such an abuse of this discretion by such court as calls for a reversal of its decision. The evidence that the appellant had refrained from drinking for a period of about a year and a half prior to the trial of the cause, is undisputed and, standing alone, would indicate an abuse of the discretionary power vested in the trial court, but this was not all the evidence given in the case. Appellant was questioned by the trial court, and this examination developed that about two or three years before the trial, he, in company with his brother and brother-in-law, the guardian, went to the trial judge and on that occasion in an extended conversation between such parties, appellant stated to such judge in substance that he had overcome his appetite for liquor, that he had not taken a drink for about a year and that he would never take another drink, and expressed a desire that such judge should have his guardian then report and turn appellant's property over to him. The guardian then said to appellant that he and his brother and the judge were his friends and would gladly turn his property over to him but that they did not believe that he had abstained from the use of intoxicating liquor long enough, that they thought that he ought to wait a little longer. Appellant insisted that he had reformed and would

never take another drink of intoxicants. The guardian and appellant's brother then stated to appellant that if he would promise, in the presence of the judge, that he would stay sober until the first of January, following, that they would come into court and say to the court that he was capable of managing his own property and that it should be turned over to him. Appellant reluctantly consented to this arrangement. The judge then told him that he would only be too glad to turn his property over to him if he would show the court and his brother and brother-in-law that he was going to abstain from the use of liquor. Before the first of January he had been intoxicated and inside of two months was "down in the gutter", and as bad as before. This evidence is of such a character as to prevent us from saying that there was a clear abuse of the trial court in the decision it reached.

Certain questions were propounded to the appellant and other witnesses when on the stand relative to appellant's moral character, and the character of his place of

4. business, involving an insinuation that it was visited by immoral women. These questions were objected to and furnish some of the grounds for new trial. Appellant, in his brief, states that after the court "let the bars down" so that appellee might bring in what appellant deemed a collateral matter, "not one witness testified to a single act of immorality, violence or vice on the part of appellant for the period of a year and a half." Appellant is corroborated in this statement by the record. It follows that no harm could have resulted from the answers and hence no reversible error is presented by the admission of the evidence.

We find no error in the record.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 827. See, also, under (1) 14 Cyc. 1102; (4) 40 Cyc. 2419. As to cases in which the exercise of judicial discretion may be controlled, see 98 Am. Dec. 375.

SOUTH WHITLEY HOOP COMPANY v. UNION NATIONAL BANK.

[No. 7,958. Filed May 15, 1913.]

1. **BILLS AND NOTES.—Bills Payable With Exchange.—Negotiability.**—The words “with exchange”, or equivalent language, render a bill otherwise negotiable by the law merchant in this State, nonnegotiable in such manner, even though it is made payable at the place where it is drawn and the question of exchange is thereby not involved. p. 447.

From Whitley Circuit Court; *Luke H. Wrigley*, Judge.

Action by the Union National Bank against the South Whitley Hoop Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Vesey & Vesey and *Gates & Whiteleather*, for appellant.
F. B. Moe, for appellee.

FELT, P. J.—This is a suit upon two bills of exchange, duly accepted by appellant, drawn by and payable to the North Bloomfield Hoop Company, Warren, Ohio, and discounted by it at the Union National Bank of said city. One of said bills of exchange is as follows:

“\$500. South Whitley, Ind., Dec. 26, 1908.

After four months (120 days), pay to the order of North Bloomfield Hoop Co., Five Hundred Dollars, with exchange. Value received and charge to the account of North Bloomfield Hoop Co., W. A. Kilgore, Pres.

To South Whitley Hoop Co., So. Whitley, Ind.

Accepted and payable at the Farmers State Bank, South Whitley, Ind.

The South Whitley Hoop Co., J. W. Donaldson, Sec. and Mgr.

Deposit at Union Nat. Bank, Warren, Ohio. North Bloomfield Hoop Co., W. A. Kilgore, Pres.”

The appellant filed four paragraphs of answer, the first of which was a general denial, the second, want of consideration, the third averred facts to show that instruments sued on

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were executed without authority, were never ratified and were *ultra vires* and void. The fourth pleaded as a set-off a debt due appellant from the North Bloomfield Hoop Company. The errors assigned and argued relate to the action of the court in sustaining demurrers to each the second, third and fourth paragraphs of answer for insufficiency of the facts alleged to constitute a defense to appellee's cause of action. Counsel on both sides concede that the special paragraphs of answer are insufficient if the instruments sued on are negotiable by the law merchant and sufficient if they are not. It is asserted by appellant, and denied by appellee, that the words "with exchange" contained in the instruments destroy their negotiability under the law merchant by making the amount due uncertain and fluctuating with the rate of exchange.

The question has been settled by repeated decisions of this court that the words "with exchange" or equivalent language, render an instrument otherwise negotiable

1. by the law merchant in this state, nonnegotiable in such manner. *Nicely v. Commercial Bank, etc.* (1896), 15 Ind. App. 563, 44 N. E. 572, 57 Am. St. 245; *Nicely v. Winnebago Nat. Bank, etc.* (1897), 18 Ind. App. 30, 47 N. E. 476; *Orner v. Sattley Mfg. Co.* (1897), 18 Ind. App. 122, 47 N. E. 644; *John Church Co. v. Spurrier* (1898), 20 Ind. App. 39, 50 N. E. 93; *Gilpin v. People's Bank* (1909), 45 Ind. App. 52, 56, 90 N. E. 91. Appellee contends that this case falls within an exception to the rule in this that where the bill or note is made payable "with exchange" at the place where it is drawn and is to be paid or discharged, the question of exchange is not involved and the words "with exchange" may be rejected as surplusage. Some decisions by the courts of Illinois and Missouri and possibly other states support this contention. However, the weight of authority does not seem to recognize this exception and in *Nicely v. Commercial Bank, etc., supra*, most of the cases cited and relied on by appellee are referred to and com-

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mented upon but not followed. The case reviews many of the decisions on the subject and renders unnecessary any extended discussion of the subject at this time. In that case the note appeared to be drawn at Janesville, Wis., and payable at a bank in this State, but the complaint averred that it "was made and executed at the said city of Union City, Indiana, where the same is payable, and was not, in truth and in fact, made at the city of Janesville, in the State of Wisconsin." Similar averments were made in the complaint in *Nicely v. Winnebago Nat. Bank, etc., supra*, and in each case, notwithstanding such averments, this court held the instrument to be nonnegotiable under the law merchant. The case of *Krieg v. Palmer Nat. Bank*, 51 Ind. App. 34, 95 N. E. 613, recently decided by this court, followed the principle which controlled the *Nicely* cases, *supra*, and other similar decisions. While authority to the contrary may be found outside Indiana, we regard the question as settled in this State. To attempt to make the distinction suggested by appellee, would only tend to confusion. Since the rule of the nonnegotiability of such instruments, is established, uniformity of application will conduce to more wholesome results than could possibly be obtained by multiplying exceptions.

The judgment of the lower court is therefore reversed with instructions to overrule the demurrer to the several paragraphs of special answer and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 101 N. E. 824. See, also, 7 Cyc. 595. As to the effect on negotiability of provision in note or bill calling for exchange, see 125 Am. St. 212. As to the negotiability of a note payable "with exchange", see 1 Ann. Cas. 385.

FLOYD v. FORDYCE.

[No. 8,016. Filed May 15, 1913.]

1. **LIBEL AND SLANDER.—Complaint.—Innuendo.**—A complaint for slander, where the words spoken are not slanderous *per se*, must show by innuendo, not only that the words were slanderously uttered, but were understood in the same slanderous sense by those in whose hearing they were spoken. p. 450.
2. **LIBEL AND SLANDER.—Evidence.—Sufficiency.**—In an action for slander, a verdict was properly directed for defendant, where the proof failed to establish any fact other than the speaking of certain words, not actionable *per se*. p. 451.
3. **TRIAL.—Issues.—Burden of Proof.**—An answer in general denial imposes on the plaintiff the burden of proving the material facts averred in the complaint by a fair preponderance of the evidence. p. 451.
4. **LIBEL AND SLANDER.—Meaning of Words.—Jury Question.**—The meaning of one charged with slander, as averred by an innuendo, is a question of fact to be decided by the jury. p. 451.

From Washington Circuit Court; *Thomas B. Buskirk*, Judge.

Action by Lucy Floyd against Alexander C. Fordyce. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

James M. Fippen and *Frank B. Fippen*, for appellant.

Mitchell & Mitchell and *James L. Tucker*, for appellee.

ADAMS, J.—This was an action by appellant against appellee for slander. It is averred in the complaint that at a time and place named, appellee, in the presence and hearing of divers persons, “falsely and maliciously spoke, published of and concerning the plaintiff, the false and malicious words following: ‘Lafe Floyd’s wife (meaning plaintiff) and another woman layed out in Borden all night with two other men in a barn.’ Meaning thereby and intending to mean and convey such information to persons then and there in his hearing, and to be understood that plaintiff, with another woman, stayed all night in a barn in the town of Bor-

den, Indiana, with two men who were not their husbands, and that plaintiff had committed the crime of adultery with one or both of said men.” Appellee’s demurrer, for want of sufficient facts, having been overruled, the complaint was answered by a general denial, and the case submitted to a jury. To support the issue tendered, appellant offered one witness who testified that appellee at the time and place charged, in the presence of others, spoke the words laid in the complaint. Appellant was a witness in her own behalf, and testified that she was a married woman, the wife of Lafayette Floyd, thirty-nine years of age, and the mother of eight children. No other evidence was offered. Appellee thereupon moved the court for a peremptory instruction, directing the jury to return a verdict for the defendant, which motion was sustained, and the jury so instructed. Verdict for appellee was returned, and judgment rendered thereon. Appellant filed her motion for a new trial, assigning as a cause therefor, the giving of the peremptory instruction. This motion was overruled, which ruling constitutes the only error relied on for reversal.

It may be said at the outset that the court erred in overruling appellee’s demurrer to the complaint. The evident theory of the complaint is that the words charged to

1. have been spoken were not slanderous *per se*, and that to make them actionable it was necessary to allege extrinsic facts, giving to the words a slanderous quality. It is alleged that the defendant made certain statements in the presence and hearing of others, meaning and intending to mean that plaintiff had been guilty of the crime of adultery, but it is not alleged that the words spoken were understood by the persons to whom they were addressed as imputing that crime. The rule is that where words are not slanderous *per se*, a complaint, to be good, must show by the innuendo, not only that the words were slanderously uttered, but were understood in the same slanderous sense by those in whose hearing they were spoken. *Cosand v. Lee*

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(1895), 11 Ind. App. 511, 38 N. E. 1099; *Freeman v. Sanderson* (1890), 123 Ind. 264, 24 N. E. 239.

The error in overruling the demurrer to the complaint, however, is available only to appellee, but if the complaint had included the averment as to the sense in which

2. the words spoken were understood, still there could be no reversal of the judgment, for the reason that the proof failed to establish any fact other than the speaking of certain words, not actionable *per se*. The answer in denial imposed on the plaintiff the burden of proving

3. the material facts averred in the complaint by a fair preponderance of the evidence. This appellant did not do.

In *Hamilton v. Lowery* (1904), 33 Ind. App. 184, 188, 71 N. E. 54, this court said: "The meaning of the defendant,

as averred by an innuendo, is a question of fact, to be
4. decided by the jury." In the leading case of *Hays v. Mitchell* (1844), 7 Blackf. 117, the court said:

"Words not actionable in themselves may express a criminal charge by reason of their allusion to some extrinsic fact, or in consequence of being used and understood in a particular sense different from their natural meaning, and thus become actionable. And when such is the case, it is as necessary to prove the extrinsic fact, or the particular and offensive sense in which the words were used, as it is to establish the words themselves." See, also, *Dodge v. Lacy* (1850), 2 Ind. *212; *Hart v. Coy* (1872), 40 Ind. 553; *Harrison v. Manship* (1889), 120 Ind. 43, 22 N. E. 87; *Alcorn v. Bass* (1896), 17 Ind. App. 500, 46 N. E. 1024; *Hinesley v. Sheets* (1897), 18 Ind. App. 612, 48 N. E. 802, 63 Am. St. 356.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 825. See, also, under (1) 25 Cyc. 451; (2) 25 Cyc. 520, 541; (3) 31 Cyc. 678; (4) 25 Cyc. 542. As to general rules applicable to libel and slander, see 4 Am. Dec. 348. As to words libelous *per se* and the contrary, as basis of action, see 116 Am. St. 804. As to evidence to support the innuendo, see 53 Am. St. 698.

CITY OF EVANSVILLE ET AL. v. PIFER.

[No. 8,000. Filed May 16, 1913.]

1. **APPEAL.—Briefs.—Statement of Nature of Action**—The statement in appellants' brief, that the action was brought by appellee to recover damages for loss of service, etc., of appellee's wife, and is based upon the same alleged negligence upon which the action by appellee's wife against appellants was predicated, is not a statement of the nature of the action in compliance with Rule 22 of the Supreme and Appellate Courts. p. 452.

From Posey Circuit Court; *Herdis F. Clements*, Judge.

Action by George Pifer against the City of Evansville and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

George H. Cunningham, Edgar Durre, Clifford T. Curry and G. V. Menzies, for appellants.

Samuel E. Crumbaker, John W. Spencer, John R. Brill and Frank H. Hatfield, for appellee.

SHEA, J.—Appellee's wife, Mollie Pifer, upon the same facts involved in this appeal, recovered judgment in the court below against appellants for personal injuries sustained by her, which judgment was affirmed in this court. See *City of Evansville v. Pifer* (1912), 51 Ind. App. 646, 100 N. E. 110.

It is insisted by appellee that the brief filed by appellants in this case is defective in the following particulars: first, in the statement of the nature of the action. Appel-

1. lant's statement is as follows: "This action was brought by appellee to recover damages for loss of service, etc., of appellee's wife, and is based upon the same alleged negligence of appellants, upon which the action of Mollie Pifer v. appellants [*City of Evansville v. Pifer. supra*] was predicated." This is not a compliance with Rule 22 of this court.

Appellee next points out that appellants do not set out in

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their brief a copy of the complaint nor of any of the pleadings, but only refer to the record where the same can be found; that appellants' brief does not attempt to state in any manner what causes for a new trial were set out in the motion, and there is nothing in the brief disclosing any of the reasons assigned for a new trial in the motion therefor. Complaint is also made that the notice served upon appellant city, which the city insists is not sufficient, is not set out in appellants' brief, either by copy or a statement of its contents, and therefore no question is presented as to the sufficiency of such notice. The brief is subject to many infirmities which we need not pass upon here. In the well-considered opinion in the case of *City of Evansville v. Pifer, supra*, the law applicable to the questions involved in this case, is clearly stated, and upon the authority of that decision, the judgment in this case is affirmed.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 824. See, also, 2 Cyc. 1013.

NEW ALBANY WOOLEN MILLS COMPANY v. SENIOR, ADMINISTRATRIX.

[No. 7,973. Filed May 27, 1913.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Complaint.—Sufficiency.—Scope of Employment.*—A complaint, in an action for the death of a servant, caused by a boiler explosion, alleging that the duties of decedent's employment required him to fire the boiler in question and that he was so engaged at the time of the explosion, is not open to the objection that it fails to disclose by direct allegations that decedent was acting in the line of his employment at the time he received the injury. p. 455.
2. APPEAL.—*Review.—Rendition of Judgment.—Motion for New Trial.*—The action of the trial court in rendering judgment on the verdict after a motion for new trial had been filed, and before overruling same, is not ground for reversal, where it appears that appellant did not object thereto on the ground that it desired to move in arrest of judgment, if the motion for a new trial were overruled. pp. 455, 456.

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3. **NEW TRIAL.—Waiver.—Motion in Arrest of Judgment.**—A motion for a new trial is waived if it is preceded by a motion in arrest of judgment. p. 456.
4. **JUDGMENT.—Motion in Arrest of Judgment.**—A motion in arrest of judgment must be filed before the judgment is rendered. p. 456.
5. **MASTER AND SERVANT.—Injuries to Servant.—Verdict.—Evidence.**—In an action for the death of a servant in a boiler explosion, where, in addition to evidence establishing the fact of the explosion, the testimony of experts who examined the boiler after the explosion showed that where the rent in the boiler occurred the shell was much thinner than the remaining portion, that such thin place had probably existed for three to six months prior to the explosion, and that the same could have been discovered by a proper hammer test, the verdict for plaintiff cannot be disturbed on the ground that the evidence is insufficient to show either that the boiler was defective or that defendant knew or could have known of such defects. p. 457.
6. **APPEAL.—Review.—Conflicting Evidence.—Verdict.**—The verdict of a jury will not be set aside on appeal for want of evidence to sustain it in a case where the evidence is conflicting, or where there is not a total want of evidence to support it. p. 457.
7. **EVIDENCE.—Weight and Sufficiency.—Duty of Court.—New Trial.**—The weight of the evidence is for the jury, but if it makes a mistake where the evidence is conflicting the trial court should grant a new trial. p. 457.
8. **APPEAL.—Review.—Harmless Error.—Instructions.**—An instruction, although containing objectionable expression, will not work a reversal if it is such as not to mislead the jury. p. 458.
9. **NEGLIGENCE.—Burden of Proof.—Presumptions.**—The plaintiff in an action for personal injuries has the burden of proving a breach of duty on the part of the defendant, but there is no presumption that a defendant has discharged the duties imposed by law. p. 458.

From Clark Circuit Court; *Harry C. Montgomery*, Judge.

Action by Martha Senior, administratrix of the estate of Joseph Senior, deceased, against the New Albany Woolen Mills Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

M. Z. Stannard and *Jonas G. Howard, Jr.*, for appellant.
Stotsenburg & Weathers, George H. Voigt and *Paris & Trusty*, for appellee.

LAIRY, J.—Appellee recovered a judgment in the trial court against appellant for damages resulting from the death of Joseph Senior. Senior was employed by appellant as night watchman at its factory and his death was caused by the explosion of a boiler located therein. It is alleged that the duties of decedent under his employment required him to fire the boiler in question and that he was so engaged at the time of the explosion. The theory of appellee is that the explosion was caused by reason of a defective condition of the boiler which was of such a character and had existed for such a length of time that it could have been discovered by appellant by the exercise of reasonable care in the inspection of the boiler. Appellant's theory is that the boiler was not defective but that the explosion was caused by a lack of water in the boiler due to the negligence of the decedent.

The sufficiency of the complaint is challenged upon the ground that it fails to disclose by direct allegations that decedent was acting in the line of his employment at

1. the time he received the injury which caused his death. To sustain its contention, appellant relies upon the case of *South Bend, etc., Plow Co. v. Cissne* (1905), 55 Ind. App. 373, 74 N. E. 282. In so far as this case tends to support the position of appellant, it has been overruled in the later case of *I. F. Force Handle Co. v. Hisey* (1913), 52 Ind. App. 235, 96 N. E. 643, 649. The complaint under consideration is not subject to the objection pointed out, but under the later decision it is clearly sufficient in this respect.

After the verdict had been returned and after the defendant had filed its motion for a new trial, the plaintiff moved the court for a judgment in her favor on the verdict.

2. The defendant in writing objected to the rendition of a judgment until after the court should rule upon its motion for a new trial. This objection was overruled by the court and judgment was rendered on the verdict, to which ruling and action of the court the defendant excepted.

Appellant asserts that this action of the court constitutes reversible error. We do not so regard it. Plaintiff was entitled to a judgment on the verdict at some time unless the motion for a new trial should be sustained. If the motion for a new trial had been sustained after the rendition of the judgment no harm would have resulted to appellant, as the judgment would have been thereby set aside. On the other hand appellant was not harmed by the subsequent overruling of the motion for a new trial, unless by the rendition of the judgment it was prevented from interposing a meritorious motion in arrest of judgment. It is well settled

3. that a motion in arrest of judgment may not be filed before a motion for a new trial without waiving the latter motion. *Cincinnati, etc., R. Co. v. Case* (1890), 122 Ind. 310, 23 N. E. 797; *Kelley v. Bell* (1909), 172 Ind. 590, 88 N. E. 58. It is equally well settled that a motion in arrest of judgment must be filed before the judgment

4. is rendered. *Brownlee v. Hare* (1878), 64 Ind. 311; *Blaemire v. Barnes* (1910), 173 Ind. 657, 91 N. E.

232. Appellant did not object to the rendition of the judgment upon the ground that it desired to file a motion in arrest after the ruling on its motion for a new trial

2. and before the judgment should be entered; and it cannot complain that its objection, based upon the grounds stated therein, was overruled. The case of *New York, etc., R. Co. v. Doane* (1886), 105 Ind. 92, 4 N. E. 419, cited by appellant does not sustain its position. This case holds that judgment entered while a motion for a new trial is pending is not a final judgment within the meaning of the statute relating to appeals; that it becomes final only, when the motion for a new trial is overruled, and that the time within which an appeal is allowed must be computed from the date of the ruling on the motion for a new trial.

The overruling of appellant's motion for a new trial is assigned as error and several questions are presented for decision under this assignment. It is first urged that the

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evidence is insufficient to sustain the verdict in that

5. there is a total lack of evidence to show, either that the boiler was defective or that the defendant had any notice or knowledge of such defects or could have obtained such knowledge by any practical mode of inspection. It is also claimed by appellant that the evidence shows without conflict that decedent was guilty of contributory negligence. Under the circumstances of this case, the mere fact that the boiler exploded would not be sufficient to justify an inference that it was defective and that the explosion resulted from such defects. If there were no evidence of a defective condition of the boiler other than the explosion, there would be a total failure of proof upon this point, but this is not the case. Two witnesses who were expert boilermakers testified that they examined the boiler a few days after the explosion, that they found a rent about 22 inches long in the shell, that where it separated it was as thin as a knife blade and that this thinness extended back two inches on each side of the opening. Another witness testified that the shell was $\frac{13}{32}$ of an inch in thickness but for two inches back from the rent it was only $\frac{3}{16}$ of an inch in thickness. The expert witnesses called by plaintiff further testified that the thin place which they discovered had probably existed for three to six months prior to the explosion and that it could have been discovered by a proper hammer test. It thus appears that there was some evidence to show a defective condition of the boiler, and that such condition might have been discovered by inspection. As to whether the explosion occurred on account of the negligence

6. of decedent in permitting the water in the boiler to get too low, the evidence is conflicting. The verdict of the jury will not be set aside on appeal for want of evidence to sustain it in a case where the evidence is conflicting or where there is evidence to support it however

7. slight. The weight of the evidence is for the jury. If it makes a mistake where the evidence is conflicting.

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the trial court should correct the mistake by granting a new trial.

Appellant finds objections to several of the instructions given by the court. We have examined these instructions in the light of the objections urged, and have reached the conclusion that the court committed no error in this regard. Instructions Nos. 18 and 19 are not happily worded. They both contain an objectionable expression, but when this expression is read in connection with the remaining part of these instructions, we do not think that the jury could have misunderstood the meaning of the court.

By instruction No. 18 tendered, appellant requested the court to instruct the jury to the effect that a presumption of the discharge of duty on the part of defendant attended it throughout the trial, and must be indulged in its favor until it was overcome by direct evidence. This is not a correct statement of the law. The burden rests upon the plaintiff to prove a breach of duty on the part of the defendant, but there is no presumption that a defendant has discharged the duties imposed by law. A similar question was recently discussed by the Supreme Court and the decision was adverse to the contention here made. *City of Indianapolis v. Keeley* (1906), 167 Ind. 516, 79 N. E. 499.

The court did not err in overruling appellant's motion for a new trial.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 1025. See, also, under (1) 26 Cyc. 1384; (2) 2 Cyc. 703; (3) 29 Cyc. 725; (4) 23 Cyc. 833; (5) 26 Cyc. 1447, 1450; (6) 3 Cyc. 348; (7) 29 Cyc. 832; (8) 38 Cyc. 1809; (9) 29 Cyc. 589, 597. As to the duty of master to furnish safe means and appliances for servant to work with, see 92 Am. Dec. 213; 21 Am. Rep. 579; 33 Am. St. 766. As to burden of proof in action by servant for injuries arising from master's negligence, see note to *Brazil Block Coal Co. v. Gibson* (Ind.), 98 Am. St. 321. For a discussion of the doctrine of *res ipsa loquitur* as applicable to a boiler explosion, see Ann. Cas. 1912 A 980.

**TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY
v. HOME INSURANCE COMPANY OF NEW YORK.**

[No. 8,001. Filed May 27, 1913.]

1. **RAILROADS.—Fires.—Liability.**—While a railroad company may use fire in the operation of its locomotives and is relieved from liability for injury occasioned by the escape of fire which necessarily results from the operation of its locomotives, it is liable for negligence in failing to properly equip such locomotives with proper spark arresters, or in operating such locomotives so as to negligently cause or permit the emission of sparks therefrom. p. 461.
2. **RAILROADS.—Fires.—Negligence.—Evidence.—Sufficiency.**—In an action against a railroad company to recover for a fire loss, evidence of facts and circumstances from which the jury may fairly infer that defendant's locomotive was either defective in its condition or negligently operated, and that the emission of sparks was unusual in quantity or character, is sufficient to warrant a jury in inferring that defendant was negligent. p. 462.
3. **RAILROADS.—Fires.—Negligence.—Jury Question.—Appeal.**—In an action against a railroad company to recover for a fire loss, the question of defendant's negligence is ordinarily a question of fact for the jury, and its finding will not be disturbed on appeal if the evidence is such that fair-minded men may honestly draw different conclusions therefrom. p. 463.
4. **RAILROADS.—Fires.—Inferences.—Negligence.**—Proof of a fire after a locomotive has passed will not of itself warrant an inference of negligence in the equipment or operation of the train. p. 464.
5. **RAILROADS.—Fires.—Negligence.—Evidence.—Sufficiency.**—In an action against a railroad company for the destruction of plaintiff's house by fire, evidence that large blazing sparks were being emitted from the passing train and that when the fire department arrived, which was about twenty minutes after the train had passed, the side of the house nearest the track was entirely burned away, and that at the time there was no fire in any of the stoves, and there was no fire anywhere in close proximity, is sufficient to warrant the jury in inferring that the building was set on fire by the passing train, and the court cannot say as a matter of law that the defendant was not negligent. p. 464.
6. **EVIDENCE.—Weight and Sufficiency.**—Where the evidence is of any probative force whatever, the weight to be given thereto, and the inferences to be drawn therefrom, are matters for the jury. p. 465.

Toledo, etc., R. Co. v. Home Ins. Co.—53 Ind. App. 459.

From Howard Circuit Court; *William C. Purdum*, Judge.

Action by the Home Insurance Company of New York against the Toledo, St. Louis and Western Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Guenther & Clark, Clarence Brown and Charles A. Schmettan, for appellant.

Harness, Moon & Voorhis, for appellee.

HOTTEL, J.—This is an appeal from a judgment for \$250 obtained by the appellee in an action brought by it against the appellant for damages to a house resulting from a fire alleged to have been caused by appellant's negligence. The appellee had written a policy of insurance on such house and claimed to be subrogated to the rights of the owner thereof by reason of having paid to him, under such policy, the loss sustained on account of such fire and by reason of an assignment to this effect from such owner. The complaint was in three paragraphs, a demurrer to each of which was overruled, but as such ruling is not questioned in this court we need only indicate in a general way the theory of each paragraph. The first paragraph proceeds on the theory that appellant, while operating its locomotive and train of cars over its track through the city of Kokomo, near the property in question, carelessly and negligently and wrongfully failed and omitted to use a safe and sufficient spark arrester on its locomotive, or other proper appliance, to prevent the emission of unusually large and dangerous sparks and coals of fire from such locomotive, and negligently, carelessly and wrongfully ran and operated said locomotive at a high and unnecessary "head of steam" and thereby caused such locomotive to emit unusually large and dangerous sparks and coals of fire, which set such property on fire. The second paragraph charges that appellant negligently, carelessly and wrongfully so ran and operated its locomotive and train of cars through said city and by

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the property in question at such a high rate of speed and excessive "head of steam" as to unnecessarily overtax the power of such locomotive and thereby caused it to emit unusually large and dangerous sparks and coals of fire, etc. The third paragraph is practically the same as the first except that the only negligence charged is appellant's failure to use a safe and sufficient spark arrester *or other proper appliance* on its locomotive to prevent the emission of unusually large and dangerous sparks and coals of fire from such locomotive, etc.

The overruling of the motion for new trial is the only error relied on. Such motion contains numerous grounds, but appellant, in its brief, presents and urges only two of such grounds, viz., that the court erred in overruling appellant's motion to direct a verdict in its favor, and that the verdict of the jury is not sustained by sufficient evidence. These grounds may be considered together as they, in effect, present the same question. It is conceded by appellant that the evidence shows "that appellant's passenger train passed the house in question puffing and blowing a whistle, running fast and that it emitted numerous sparks, some of which were as large as a woman's finger and that in about twenty minutes after the train passed the house, it was found to be on fire." It is insisted that such evidence in no wise tends to prove either defective equipment of the locomotive or negligent operation; that there is nothing in the evidence "to show that a locomotive equipped with a spark arrester in good repair and carefully operated by competent employes, would not have emitted and thrown sparks and coals of fire of the same size, in the same quantity, for a like distance, and with the same effect as those emitted by the locomotive in question."

It may be admitted as appellant contends, that a

1. railroad company has the right to use fire in the operation of its locomotive and that it is a matter of universal knowledge that no locomotive can be so operated

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that it will not emit fire at times and that such right to use fire relieves such company from liability for injury to property resulting from the escape of fire which necessarily results from the operation of its locomotives; that it is only liable for its negligence in failure to properly equip such locomotive with the proper spark arrester or for negligence in its operation of such locomotive in such a manner as to negligently cause or permit the emission of sparks from such locomotive. *Lake Erie, etc., R. Co. v. Gossard* (1896), 14 Ind. App. 244, 245, 42 N. E. 818; *New York, etc., R. Co. v. Baltz* (1895), 141 Ind. 661, 36 N. E. 414, 38 N. E. 402; *Indianapolis, etc., R. Co. v. Paramore* (1869), 31 Ind. 143; *Toledo, etc. R. Co. v. Fenstermaker* (1904), 163 Ind. 534, 538, 72 N. E. 561. This admission, however, does not necessitate the conclusion reached by appellant that there is no evidence in this case from which a jury could infer, either that the appellant was negligently using on its locomotive at the time of such fire a defective spark arrester, or that it was at such time so operating its locomotive as to negligently cause it to emit sparks of fire in unusual size and quantities, and that the firing of the house in question with the resulting damages thereto, was attributable to the one or the other of said causes.

Appellant contends that the "only way to prove
2. negligent operation or construction by circumstantial evidence is first, by proof of quantity, size and character of the sparks actually thrown out; second, by proof by experts that sparks of such character would not be emitted from a locomotive in proper repair or properly operated," and that proof of size and quantity of the sparks alone without supplementing it with the further proof indicated, will not warrant an inference of negligence. In support of its contention appellant cites: *Peck v. New York Central, etc., R. Co.* (1901), 165 N. Y. 347, 59 N. E. 206; *Toledo, etc., R. Co. v. Fenstermaker, supra*. While these authorities recognize that such negligence may be proved

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in the manner indicated by appellant, they do not support its position that *this is "the only way to prove"* such fact by circumstantial evidence. The case of *Peck v. New York Central, etc., R. Co., supra*, 206, which lends strongest support to appellant's contention, recognizes the probative value and effect of evidence showing that sparks of unusual size and quantity were emitted from the locomotive in question as is evidenced by the following language of the opinion in that case: "But while it was necessary for the plaintiff to affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engines for which the mere occurrence of the fire was not sufficient, it was not necessary that he should prove either the specific defect in the engine or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if the plaintiff proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition or negligently operated. *The emission of sparks unusual in quantity or character, or of an extraordinary size, such as would not be emitted from well-constructed locomotives in proper repair, would justify the jury in inferring negligence, and, though not shifting the burden of proof, would cast upon the defendant the duty of explanation.*"

Whatever may be the rule in other jurisdictions,

3. we think it is well settled by the decisions of this

State, that negligence in this character of cases, the same as in all other cases, is, ordinarily, a question of fact for the jury, and that on such question the Appellate Court will not substitute its judgment for that of the jury, where the evidence is of such a character, that fair minded men may honestly draw therefrom different conclusions. *City of Franklin v. Harter* (1891), 127 Ind. 446, 448, 26 N. E. 882; *Cole v. Searfoss* (1912), 49 Ind. App. 334, 97 N. E. 345, 347; *Malott v. Hawkins* (1902), 159 Ind. 127, 135,

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63 N. E. 308; *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 494, 495, 77 N. E. 945; *W. C. DePauw Co. v. Stubblefield* (1892), 132 Ind. 182, 185, 31 N. E. 796; *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 701, 88 N. E. 612.

To the extent that proof of a fire after a locomotive

4. has passed will not of itself warrant an inference of negligence in the equipment or operation of such train, appellant's contention is supported by Indiana decisions as well as by the decisions of other jurisdictions.

5. The evidence in this case, however, shows more than that the property took fire after the engine passed. In addition to the facts before indicated as conceded by appellant to have been proven, there was evidence to the effect that the fire alarm was received at the fire station in seventeen minutes after the train in question left the Kokomo station. The fire department reached the fire three or four minutes later and then found the west side and northwest part of the house practically burned away. The distance from the northwest corner of the house to the center of appellant's track west was 150 feet, and measured on a northwest line, was 51 feet. There was a strong wind from the west and northwest. One of the witnesses heard the train coming very fast and it blew so rapidly that she got up and walked to the corner of the house and "saw the fire and sparks dazzling around rapidly and the wind was blowing right toward our house *and the sparks from it was like blazes of fire toward our house.*" (Our italics.) This witness said she saw sparks, and a good many of them the size of the end of her finger "that lit toward the house," that she was alarmed as to the safety of the house; that her little daughter called her to see the sparks and fire coming out of the engine; that she saw blazing sparks and cinders fall all through the yard. This display of sparks was in daytime about 2:38 p. m. and the fire alarm was received at the fire station at 2:55 p. m. There was evidence show-

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ing that at the time the house caught on fire there was no fire in any of its stoves or flues, and that there were no houses or fire anywhere in close proximity. Under this evidence this court cannot say as a matter of law that appellant was not guilty of any negligence, but on the contrary such evidence warranted the jury in inferring that the unusual size and quantity of the sparks shown by such evidence could be accounted for only on the theory that appellant either used a defective spark arrester on its locomotive or that it so negligently operated it that it emitted sparks in unusual size and quantities, and that the sparks so emitted set fire to the building in question. That such evidence was sufficient to warrant the jury in inferring that the building was set on fire by the passing engine has been frequently decided by both the Supreme Court and this court. *Toledo, etc., Co. v. Fenstermaker, supra*; *Pittsburgh, etc., R. Co. v. Indiana Horseshoe Co.* (1900), 154 Ind. 322, 333, 56 N. E. 766, and authorities cited; *Baltimore, etc., R. Co. v. Trustees, etc.* (1912), 50 Ind. App. 220, 98 N. E. 141, 142 and cases there cited.

If appellant be correct in its contention that negligence in such cases can never be proven by the size and quantity of the sparks, except it be supplemented by expert proof showing that a locomotive properly operated with an approved spark arrester in proper repair would not emit such sparks, it must follow that evidence of the size and quantity of the sparks and the distance they are thrown, and the length of time they continued to burn, is without any probative force in determining such question. On

6. the other hand, if it be conceded that such evidence has any probative force, in determining such question, and all the authorities cited by appellant so hold, it follows that the weight to be given thereto and the inference to be drawn therefrom must be, as in all other cases, a question for the jury unless the facts be of such a character,

that but one inference can be drawn therefrom, in which case it becomes the duty of the court under the authorities before cited, to draw the inference.

We cannot say that the facts disclosed by the evidence in this case warrant but a single inference, but on the contrary they are of such a character that fair and honest men might differ as to the inference that should be drawn therefrom, and hence that drawn by the jury should be allowed to stand. Judgment affirmed.

NOTE.—Reported in 101 N. E. 1035. See, also, under (1) 33 Cyc. 1325, 1332, 1336; (2) 33 Cyc. 1379; (3) 33 Cyc. 1394, 1396, 1404; (4) 33 Cyc. 1359; (5) 33 Cyc. 1361, 1381; (6) 38 Cyc. 1516, 1517. As to validity of law imposing upon railroad companies duty to equip engines with spark arresters and making communication of fire *prima facie* evidence of negligence, see 62 Am. St. 171. On the question of the effect of presumption from fact that fire was set by locomotive to carry question of negligence to jury, see 5 L. R. A. (N. S.) 99. As to the power of the legislature to make injury by fire from locomotives *prima facie* evidence of negligence, see 32 L. R. A. (N. S.) 227. As to the presumption of negligence arising from the communication of fire by a railroad engine, see 1 Ann. Cas. 815; 16 Ann. Cas. 882.

HOME TELEPHONE COMPANY v. WEIR.

[No. 8,005. Filed May 27, 1913.]

1. NEGLIGENCE.—*Contributory Negligence.*—*Instructions.*—Where instructions are given stating that plaintiff is entitled to recover on proof of the allegations of the complaint, they may be cured by other instructions which fully cover the defense of contributory negligence. p. 469.
2. TELEGRAPHS AND TELEPHONES.—*Operation.*—*Maintenance.*—*Occupation of Streets.*—*Duty.*—It is the duty of a telephone company to exercise ordinary care to use and maintain its wires along and over streets so as to prevent the same from becoming dangerous, but such duty is not absolute. p. 469.
3. TELEGRAPHS AND TELEPHONES.—*Operation.*—*Maintenance.*—*Instructions.*—In an action for injuries to plaintiff's eye caused by the defective condition of a telephone line along a street, the defect in an instruction imposing on defendant the absolute duty to so maintain its wires as not to obstruct or render dangerous

the use of the street was not rendered harmless by the further statement, "if it negligently failed to so maintain its wires, then it must respond in damages." p. 470.

4. **TELEGRAPHS AND TELEPHONES.—Defective Wires.—Evidence.—Notice.**—In order to recover for injuries caused by the defective condition of telephone wires along a highway, it is not necessary that the evidence should establish the fact that defendant had actual notice of the defect. p. 470.
5. **TELEGRAPHS AND TELEPHONES.—Defective Wires.—Notice.—Instructions.**—In an action for damages caused by a defective telephone wire along a street, an instruction from which the jury could infer that, if defendant had notice of the condition of the wires in any part of the town, it would be charged with notice of the defect at the point where plaintiff was injured, was erroneous. p. 471.
6. **APPEAL.—Review.—Misconduct of Counsel.**—Misconduct of counsel in a personal injury case in referring to the presence of the representative of an insurance company is not available for reversal, where the court withdrew the remarks from the jury and instructed it not to consider them. p. 471.

From Clark Circuit Court; *George H. D. Gibson*, Special Judge.

Action by Oscar Weir against the Home Telephone Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

M. Z. Stannard and *Jonas G. Howard, Jr.*, for appellant.
L. A. Douglass and *S. G. Wilkinson*, for appellee.

SHEA, J.—Appellee brought this action to recover damages from appellant for injuries alleged to have been sustained by reason of its negligence in permitting a wire extending between certain of its poles, to hang down, with the end of which appellee came in contact and was struck in the left eye. A demurrer to the complaint in one paragraph was overruled. Answer in general denial. A trial of the issues formed resulted in a verdict and judgment for appellee. Appellant's motion for a new trial was overruled, and this ruling is assigned as error.

Briefly, the facts as shown by the complaint, are, that appellant is a corporation engaged in operating a tele-

phone system between various points in Indiana, among them the town of Sellersburg, Clark County, Indiana, where for some years prior to February 10, 1903, it had conducted its business and maintained an exchange; that in the conduct of its business appellant had erected in said town a large number of poles, on which were strung metal wires, by means of which it transmitted messages. Some of these poles were located on Maple Street, an improved public highway and street in a thickly settled part of the town, which was much frequented and traveled by the public generally. Several days previous to the date of the injury complained of, one of the metal wires attached to a pole on Maple Street had broken down, and hung over the sidewalk on the west side of the street, the end of it extending to about five feet of the surface of the sidewalk; that appellant knew the wire was down and so hanging for as much as three days prior to the happening of the injury, or with reasonable diligence might have known of this condition, and with this knowledge carelessly and negligently failed to remove the wire and permitted it to so remain until after appellee was injured; that the end of the metal wire was broken off at an angle, and the edge was very sharp at the point of breakage; that while appellee, on February 3, 1910, was lawfully using and passing along Maple Street, where the wire was hanging down, said wire, without any fault or negligence on his part, came in contact with his left eye, striking the eyeball, and severely cutting and lacerating it.

Under the motion for a new trial the errors presented are the giving of instructions Nos. 1, 3, 8 and 13 requested by appellee, and the misconduct of counsel in argument. Instruction No. 1 sets out numerous facts upon which it bases a statement that appellee would be entitled to recover if all the material allegations of the complaint are proved. It is urged that the defense of contributory negligence was at issue, and that even though the averments of the com-

plaint are proved, the plaintiff would not be entitled to recover if contributory negligence is also shown; that the language is therefore misleading and harmful, and that the averments of the complaint, if proven, simply make a *prima facie* case. Instruction No. 8, in addition to other infirmities which will be pointed out, also states that if the material allegations of the complaint "have been proven to your satisfaction, your verdict should be for the plaintiff"; likewise instruction No. 13 ignores the defense of contributory negligence, and singles out and gives prominence to certain phases of the evidence, which, it is urged, invades the province of the jury.

It has been held by this court as well as the Supreme Court, that where instructions are given stating that plaintiff is entitled to recover upon proof of the allegations of the complaint omitting the defense of contributory negligence, they may be cured by other instructions which fully cover such defense. In view of the fact that there are other instructions which fully cover the defense of contributory negligence, this instruction was not erroneous. *Newcastle Bridge Co. v. Doty* (1907), 168 Ind. 259, 79 N. E. 485; *McIntyre v. Orner* (1906), 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. 359, 8 Ann. Cas. 1087; *Indianapolis Traction, etc., Co. v. Smith* (1906), 38 Ind. App. 160, 77 N. E. 1040. But there are other infirmities in the instructions which we feel can not receive the sanction of

2. this court. By instruction No. 3 the jury is told that: "It was the *absolute duty* of defendant to so use and maintain its wires along and over said streets and public places so as not to obstruct the use of the street by the public or render it dangerous for use." This instruction makes it, as the language shows, the absolute duty of appellant to have its wires at all times in such condition that the streets could be used without danger to the public. It is the duty of appellant to use ordinary care to use and

maintain its wires along and over the streets so as to prevent their becoming dangerous, but this duty is not absolute. *Terre Haute, etc., Traction Co. v. Latham* (1913), *ante* 366, 101 N. E. 746; *Dooley v. Town of Sullivan* (1887), 112 Ind. 451, 14 N. E. 566, 2 Am. St. 209; *Indiana Nat. Gas, etc., Co. v. Vauble* (1903), 31 Ind. App. 370, 68 N. E. 195; *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 53

N. E. 235. Appellee's able counsel insist that this

3. language is explained and made harmless by the following language used in the same instruction—"if it negligently failed to so maintain its wires, then it must respond in damages," but this court is not able to so construe the language. In the case of *Terre Haute, etc., Traction Co. v. Latham, supra*, it is said: "The instruction imposes the absolute duty on appellant to maintain the highway with reference to its tracks in such a condition as to be reasonably safe for use, whereas the law exacts only reasonable care and skill in this regard. The instruction was therefore erroneous." "Absolute" is defined in the Century Dictionary as "free from every restriction"; "unconditional"; "fixed"; "determined"; "not merely provisional"; "irrevocable". In *Cumberland Tel., etc., Co. v. Pierson* (1908), 170 Ind. 543, 84 N. E. 1088, the court in passing upon the sufficiency of a complaint uses this language: "Appellant was entitled under the law to a reasonable time in which to make necessary repairs, after obtaining actual knowledge or constructive notice of the alleged defect, before responsibility for neglect to make proper repairs could attach." This correctly states appellant's duty and is inconsistent with the statement in the instruction that it was appellant's absolute duty to keep its wires safe for public use, which took no account of delays in notice or unavoidable accidents. This instruction is therefore erroneous.

Instruction No. 8 contains this language: "It is

4. not necessary that the evidence establish the fact that defendant had actual notice of the existence of the

broken and hanging wire at said place prior to the time of the accident in order to render it liable in damages in this case.” So much of the instruction states the law correctly; then follows: “If it received notice that any of its wires were down in the town of Sellersburg, it was its duty to investigate the report and notice within a reasonable time, and to be diligent in making said investigation, and if the evidence shows you that after receiving said information the company was not diligent in investigating the notice, and discovering the condition of the wire, and that if it had been diligent in making said investigation it would have learned of the location and situation of the broken and hanging wire in time to have removed it before the accident to plaintiff, then I instruct you that you have the right to find that defendant was guilty of negligence in permitting the said wire to be there at the time of the accident, and if the other material allegations of the complaint have been proved to your satisfaction, your verdict should be for the plaintiff.”

The jury might infer from this instruction that if

5. appellant had notice of the condition of the wires in any part of the town of Sellersburg, it would be charged with notice of the condition of the wire at the point where appellee was injured, however remote it might be. The instruction in this respect is erroneous, as being misleading and confusing to the minds of the jury. In view of the errors pointed out in the instructions, the court is not able to say they were harmless.

The misconduct on the part of counsel in referring

6. to the presence of some representative of an insurance company, during the progress of the trial, was reprehensible, and the court rightly withdrew the remarks from the jury, and instructed the jury not to consider them, so that any error which might be predicated on such misconduct was cured. The theory of the law in this State is that any harm that may come from such misconduct is cured by the court's instructions. Appellant's learned counsel has

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cited many authorities from other states which support his earnest contention that the alleged misconduct is sufficiently harmful to warrant the court in reversing the cause. This, however, is not the rule in Indiana, and this court is bound by the rule often announced by the Supreme Court. *Smith v. State* (1905), 165 Ind. 180, 74 N. E. 983, and authorities cited. See, also, *Southern R. Co. v. Bulleit* (1907), 40 Ind. App. 457, 82 N. E. 474; *Southern Ind. R. Co. v. Davis* (1904), 32 Ind. App. 569, 69 N. E. 550.

For the errors pointed out, this cause is reversed and a new trial ordered. Judgment reversed.

NOTE.—Reported in 101 N. E. 1020. See, also, under (1) 38 Cyc. 1785; (2) 37 Cyc. 1638, 1639; (3) 37 Cyc. 1646; 38 Cyc. 1782; (4) 37 Cyc. 1639; (5) 37 Cyc. 1646; (6) 38 Cyc. 1503. As to improper remarks of counsel in course of argument, see 56 Am. Rep. 814; 58 Am. Rep. 648. On the general question of liability for injury or death of traveler coming in contact with electric wire in highway, see 31 L. R. A. 566; 22 L. R. A. (N. S.) 1169.

MITCHELTREE SCHOOL TOWNSHIP v. BAKER.

[No. 7,926. Filed May 29, 1913.]

1. SCHOOLS AND SCHOOL DISTRICTS.—*Township Trustee.—Powers.*—*Notice.*—The power and authority of a township trustee is purely statutory, and all persons contracting with him are bound to know the extent of his authority and that he can create no binding obligation beyond the scope of the authority conferred on him by statute. p. 474.
2. SCHOOLS AND SCHOOL DISTRICTS.—*Teachers.—Contracts.—Township Reform Act.*—While to the extent that the minimum wage must be paid, and the minimum school term taught, as provided by §6599 Burns 1908, Acts 1907 p. 146, and §6411 Burns 1908, Acts 1899 p. 424, the contract between a teacher and the township trustee has been definitely fixed by the legislature and is not affected by the provisions of the township reform act (§§9590-9602 Burns 1908 Acts 1899 p. 150, Acts 1901 p. 415), a contract for the payment of more than the minimum wage is within the provisions of the township reform act and is not enforceable as to the amount in excess of the minimum wage unless an appropriation for the payment of same has been duly made by the advisory board. p. 474.

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3. TOWNSHIPS.—*Township Reform Act.—Advisory Boards.*—The purpose of the township reform act is to prevent unwise and unnecessary expenditure of public funds, and under that act the advisory boards of the various townships of the State are alone authorized to allow the contracting of debts against their respective townships, and then only in the manner provided by statute. p. 475.
4. SCHOOLS AND SCHOOL DISTRICTS.—*Teachers.—Action on Contract.—Answer.—Sufficiency.*—In an action by a teacher to recover the wage stipulated in the contract, which was in excess of the minimum wage provided by §6599 Burns 1908, Acts 1907 p. 146, an answer alleging that no sufficient funds were on hand at the time of executing the contract, that sufficient funds were not available for the payment of more than the minimum wage, and that the contract was unauthorized, stated a good defense to the action. p. 476.

From Martin Circuit Court; *Hileary Q. Houghton*, Judge.

Action by Tyrey E. Baker against Mitcheltree School Township, of Martin County. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Frank E. Gilkison, for appellant.

F. Gwin, for appellee.

IBACH, J.—There is but one question presented by this appeal in addition to those decided in the case of *Rutherford School Tp. v. Craney* (1912), 51 Ind. App. 236, 99 N. E. 485. Appellee by this action seeks to recover the difference between the contract price for teaching one of the township schools and the minimum wage declared by statute, which latter amount, it appears, was paid him. To the complaint containing these facts appellant filed answer in which it is averred in substance that the contract sued on, was for a sum of money in excess of the funds in the hands of the trustee and in excess of the funds obtainable from the various levies made for school purposes and that the wages per diem set out in the written contract between the trustee and appellee, had not been authorized and were in excess of the amount allowed by law for the minimum wage for the teachers of township schools and that under the

regulations made by the Auditor of State it was impossible for the school township to receive assistance from the state common school fund to pay his per diem in excess of the minimum, which in the case of appellee was \$2.79 1-5 per day, all of which facts the plaintiff knew at the time of entering into said contract and continuously during the performance thereof. A demurrer filed to this paragraph of answer was sustained and this action of the trial court is one of the errors assigned for reversal. Consequently, the question which we are called upon to determine is whether appellant's answer shows the contract sued on, was one within the statutory power of the trustee to make.

The power and authority of a township trustee

1. is purely statutory and his acts create no binding obligation upon his township unless they are within the scope of his statutory power and all persons who enter into a contract with such officer are bound to know the extent of his authority, and that beyond the limit of such authority he can not bind the township, either civil, or school. *Indiana Trust Co. v. Jefferson Tp.* (1906), 37 Ind. App. 424, 427, 77 N. E. 63; *Clinton School Tp. v. Lebanon Nat. Bank* (1897), 18 Ind. App. 42, 45, 47 N. E. 349.

The statute with reference to the employment of

2. teachers by a township trustee does not differ in any essential respect from statutes relating to other contracts of township trustees, and the "Township Reform Act" (§§9590-9602 Burns 1908, Acts 1899 p. 150, Acts 1901 p. 415) applies to contracts made by the township trustee with his teachers, as well as to all other contracts made in behalf of the township. It is held however, in the case of *Rutherford School Tp. v. Craney, supra*, that the minimum wage which must be paid the teacher and the minimum school term are matters definitely fixed by statute, which can not be reduced by a contract with the trustee, and to this extent the legislature has made the contract for the parties.

But as to the excess of pay over these minimum requirements all such contracts must be held to fall within the provisions of the township reform act. By that act it is provided, "The trustee shall * * * present a detailed and itemized statement in writing of his estimated expenditures for which appropriations are asked, specifying the number of teachers necessarily employed, their salaries respectively * * *. The advisory board shall have full power * * * to appropriate for any purpose a sum not greater than that estimated in the items therefor." §9593 Burns 1908, Acts 1899 p. 150, §4. "Upon a special call of the township trustee * * * said board may * * * determine whether an emergency exists for the expenditure of any sums not included in the existing estimates and levy. In the event that such an emergency is found to exist, said board may authorize * * * the trustee to borrow a sum of money * * * sufficient to meet such emergency. * * * In no event shall a debt of the township be created except by the advisory board of such township, and in the manner herein specified, and any payment of any debt not so authorized from the public funds of such township shall be recoverable upon the bond of the trustee * * *." §9595 Burns 1908, Acts 1901 p. 415. Since it is made to appear that the township trustee entered into the contract in suit without sufficient funds on hands at the time the contract was made and without making provision therefor in the manner provided by law, such contract was without the authority of the trustee to make, except as to that part thereof which the statute commands.

The township reform law was enacted to prevent

3. unwise and unnecessary expenditure of the public funds and the legislature in its wisdom has seen fit to provide for the election of advisory boards in the various townships of the State that are alone authorized by law to allow the contracting of debts against such townships and then only in the manner allowed by statute.

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The answer not only shows the executing of the contract at a time when the trustee did not have sufficient funds on hand to meet it, and that sufficient funds were not

4. available from all sources provided by law from which school funds are derived to continue the school term beyond the period of 120 days and then only by paying the minimum wage to each teacher, and that the contract sued on was unauthorized and wholly without the power of the trustee to execute. It seems therefore that this paragraph of answer stated a good defense to plaintiff's complaint, wherein wages in excess of the statutory minimum wage were sought to be recovered, and the demurrer thereto should have been overruled.

Judgment reversed, with directions to overrule appellee's demurrer to appellant's answer and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 101 N. E. 1037. See, also, under (1) 38 Cyc. 627; (2) 35 Cyc. 1080; (3) 38 Cyc. 645; (4) 35 Cyc. 1103, 1106. As to the requirements that the duties of a public officer must be public duties and prescribed by law, see 63 Am. St. 188. For a discussion of the right of a school teacher to compensation as dependent on the validity of his contract of employment, see Ann. Cas. 1913 C. 372.

JUDAH ET AL. v. F. H. CHEYNE ELECTRIC COMPANY.

[No. 8,006. Filed May 29, 1913.]

1. **MECHANICS' LIENS.—Foreclosure.—Complaint.—Requirements.**—Under the mechanics' lien statute (Acts 1909 p. 295, §§1, 2), the complaint in an action to foreclose must show by its averments that the materials and labor for which a recovery is sought were furnished for the particular building against which the lien is asserted, and is insufficient if it merely shows that they were used in such building. p. 479.
2. **MECHANICS' LIENS.—Foreclosure.—Complaint.—Sufficiency.**—A complaint for the foreclosure of a mechanic's lien, averring that defendants are indebted to plaintiff for labor and material furnished by plaintiff at the special instance and request of defendants in the repair and construction of certain work upon a certain described building, sufficiently shows that the labor and materials

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were specially furnished for the particular building against which the lien is asserted. p. 480.

3. **PLEADING.—Construction.—Inferences.**—Where the facts averred in a pleading admit of but one inference, the court will indulge such inference in aid of the pleading. p. 481.
4. **MECHANICS' LIENS.—Foreclosure.—Complaint.—Sufficiency.**—A complaint for the foreclosure of a mechanic's lien for labor and material furnished "in the repair and construction of certain electrical work and electric wiring in and upon" a certain building, is not open to the objection that it fails to show affirmatively that such labor and material were furnished for the "erection, alteration, repair, or removal", of the building. p. 481.
5. **MECHANICS' LIENS.—Foreclosure.—Ownership of Property.**—In an action to foreclose a mechanic's lien, defendants' ownership of property against which the lien is asserted must be established. p. 483.
6. **TRIAL.—Issues.—Findings.**—To sustain a decision for plaintiff, the special findings must cover all the facts essential to recovery under the issues tendered by his complaint, and the failure to find any such fact is the equivalent of a finding against him. p. 483.
7. **APPEAL.—Review.—Findings.—Inferences.**—Where the primary facts found lead to but one conclusion, or where the facts found are of such a character that they necessitate the inference of an ultimate fact, such ultimate fact will be inferred and treated as found. p. 484.
8. **APPEAL.—Review.—Findings.—Construction.**—Intendments and presumptions are in favor of a finding rather than against it, and if, when read as a whole, such finding can be said to sustain the conclusions of law stated thereon, no error can be successfully predicated on the exceptions to such conclusions. p. 484.
9. **MECHANICS' LIENS.—Foreclosure.—Findings.—Ownership of Property.**—In an action to foreclose a mechanic's lien, where the only inference that could be drawn from the finding of facts as a whole, was that defendants, as trustees and devisees, became the owners of the real estate and continued as such and rented such real estate and contracted with plaintiff for the improvements thereon, received and accepted such improvement as such owners, and offered and tendered payment of the amount they claimed to be due thereon, and litigated the difference between the amount of the tender and the amount sought to be recovered by plaintiff, the judgment for plaintiff will not be reversed because the court did not in express words find the ultimate fact of present ownership of the real estate in question. p. 484.
10. **MECHANICS' LIENS.—Foreclosure.—Findings.—Sufficiency.**—In

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an action for the foreclosure of a mechanic's lien, a special finding that pursuant to contract the plaintiff furnished the labor and material, "that defendants accepted said repairs", etc., and that a certain sum "remains due and unpaid at the time of the commencement of this action from the defendants herein to the plaintiff on account of the sale, furnishing and installation of the aforesaid wiring and electrical material in said building", is not objectionable on the ground that it fails to state that any work or material was furnished for any building or that any building was repaired. p. 485.

11. **APPEAL.—Review.—Findings.—Sufficiency.**—Where the findings in an action to foreclose a mechanic's lien state that the work was completed on July 2, and that plaintiff's notice was filed on September 14, "and within the sixty days from the date on which plaintiff completed the installation and wiring of said electrical apparatus in the said building", it will be presumed, in the absence of the evidence from the record, and in view of the fact that the exhibit filed with the complaint shows items of labor and material furnished up to and including July 22, that the finding that the work was completed July 2 is an error in date, and the finding that the work was completed within the sixty days will control. p. 486.

12. **MECHANICS' LIENS.—Extent of Lien.—Separate Buildings.—Special Findings.**—Under Acts 1909 p. 295, §§1, 2, providing that a lien shall extend to the interest of the owner of the lot or parcel of land on which the structure stands or with which it is connected, and that the entire land upon which any such building, etc., is situated, including that portion not covered therewith, shall be subject to lien, a declaration of a lien on the entire parcel of real estate was authorized on a special finding of facts showing the existence of three separate buildings on a designated lot and that the labor and material were furnished directly to defendants and all put into a building or buildings standing on such lot, and in the absence of any issues and supporting evidence that would require a restriction of the lien to a certain subdivision of the lot. (*Hill v. Ryan* [1876], 54 Ind. 118; *Hill v. Braden* [1876], 54 Ind. 72; *Wilkerson v. Rush* [1877], 57 Ind. 172; and *McGrew v. McCarty* [1881], 78 Ind. 496, distinguished.) p. 486.

From Superior Court of Marion County (80,404);
Charles J. Orbison, Judge.

Action by the F. H. Cheyne Electric Company against John M. Judah and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

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Henry J. Brandon and Charles W. Appleman, for appellants.

Gideon W. Blaine and Henry Warrum, for appellee.

HOTTEL, P. J.—This was an action brought by appellee against appellants and the “unknown heirs, executors, administrators, personal representatives, legatees and devisees of Harriet Judah, deceased,” and other unknown heirs and persons whose names are unknown, to foreclose a mechanic’s lien. The complaint is in one paragraph, a demurrer to which was overruled. This ruling is the first error assigned. It is urged against the complaint that it fails to charge that the labor and materials sued for were “specially furnished” for the particular building against which the lien is asserted. The language of the act here in-

1. volved, and the authorities construing it, and similar statutes, leave no doubt as to the correctness of appellant’s contention that in actions of this character the plaintiff must show by the averments of his complaint and by his proof that the materials and labor for which he seeks a recovery were *furnished* for the particular building against which the lien is asserted. It is not enough to show merely that they were *used* in such building. Acts 1909 p. 295, §§1 and 2; *City of Crawfordsville v. Brundage* (1877), 57 Ind. 262, 265; *City of Crawfordsville v. Lee* (1877), 58 Ind. 597; *City of Crawfordsville v. Straight* (1877), 58 Ind. 599; *Hill v. Sloan* (1877), 59 Ind. 181, 187; *Potter Mfg. Co. v. A. B. Meyer & Co.* (1909), 171 Ind. 513, 519, 86 N. E. 837, 131 Am. St. 267. The lien in such cases is acquired by compliance with the statute, and is predicated on the assumption that credit is given on account of the building rather than to its owner. This assumption necessarily presupposes that the person who sells or furnishes the labor or material knows, when he furnishes it, that it is going into the particular building on which he is extending the credit and on which he expects to assert a lien. It follows that it is not enough to aver and prove merely that a contractor *purchased* such

material or labor for such building and used it therein. Such averment indicates no *knowledge on the part of the person furnishing* such labor or material *of the purpose, or the building, for which such material or labor was to be used* and hence no intent to sell on the credit of such building.

The complaint here involved alleges that “on the 15th
2. day of June, 1909, and more than a year prior thereto, said defendants were the owners of the following described real estate to wit * * * ; that said defendants are indebted to this plaintiff in the sum of three hundred ninety-one and 89-100 (\$391.89) dollars for work and labor done and materials furnished, said work, labor and materials being done and furnished by said plaintiff to said defendants, at the special instance and request of the defendants, in the repair and construction of certain electrical work and electric wiring in and upon the brick building situated on the above described real estate, on the said 15th day of June and thereafter.” These averments are easily distinguishable from those held insufficient in the cases relied on by appellant. They show that the material and labor for which the recovery is here asked was *furnished* at the instance and request of the owners themselves and not to a contractor or subcontractor as was done in some of the cases relied on by appellant and in this complaint it is averred that such labor and materials were “*furnished* by said plaintiff to said defendants * * * in the repair and construction of certain electric wiring *in and upon* the brick buildings situated on the above described real estate,” not that they were *purchased* for such buildings as was the case in some of the decisions relied on by appellant. The averment that appellee “*furnished*” such work and labor in the repair of the wiring in and upon the brick building, etc., necessitates the inference that such labor and material was not only used in and upon such building but that it was *furnished* for such building and in our judgment completely meets the requirements of §§1, 2, Acts 1909 p. 295, *supra*, and the de-

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cisions before cited. It has been held many times by
3. the Supreme Court and this court that where the facts averred in a pleading admit of but one inference, that the court will indulge such inference in aid of the pleading, and under some of the more recent authorities, a more liberal rule with reference to the indulging of inferences in favor of a pleading has been announced. *Cleveland, etc., R. Co. v. Perkins* (1908), 171 Ind. 307, 313, 86 N. E. 405, and authorities cited; *Holliday & Wyon Co. v. O'Donnell* (1909), 44 Ind. App. 647, 654, 90 N. E. 24; *Antioch Coal Co. v. Rockey* (1907), 169 Ind. 247, 254, 255, 82 N. E. 76; *Town of Newcastle v. Grubbs* (1908), 171 Ind. 482, 86 N. E. 757; *Agar v. State* (1911), 176 Ind. 234, 94 N. E. 819; *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Holliday & Wyon Co. v. O'Donnell* (1913), .. Ind. App. ..., 101 N. E. 642, 644, and authorities cited. The complaint in this case is sufficient under either rule and under all of the authorities cited.

It is also urged against the complaint that it fails to show affirmatively that the labor and materials were furnished
for the *erection, alteration, repair or removal* of the
4. building; that the averment that such labor and material were used in the repair and construction of certain electrical work and electric wiring, should have been supplemented by an averment that the "electrical work and electrical" wiring were a part of such building. This objection is without merit. The equivalent of the averment contended for, is found in the averment that such wiring was "in and upon the brick building," etc.

At the request of the several defendants the trial court made a special finding of facts and stated its conclusion of law thereon. The correctness of such conclusions is presented by the errors assigned and relied on for reversal. The court by its first finding found that appellee is a corporation

engaged in the business of electrical contracting and engineering and selling electrical supplies. Findings two, three and four are in substance as follows: (2) On May 23, 1884, Harriet Judah was the owner of lot number 7, in square 64, in the city of Indianapolis, except 60 feet off the north end of said lot, and on said date died, leaving a will by which said real estate was left to John M. Judah, Samuel B. Judah and Noble B. Judah, as trustees, with power to rent, lease, manage and sell in fee simple, the same, until partition. Subject to said trust, said real estate was devised in equal parts to said John M. Judah, Samuel B. Judah, Noble B. Judah, Alice Clarke, and one share to the children of testator's late daughter Katherine Noble, provided, if either of said sons, John M. Judah, Samuel B. Judah, Noble B. Judah or Alice Clarke should have died without living issue before testator's death, then the share which would otherwise have gone to such decedent or issue, should be equally divided among the survivors; and provided, also, that if either of such devisees should have died leaving issue surviving, at the time of testator's death, then said issue should take by way of representation.

(3) The real estate hereinabove described, is of irregular shape, roughly triangular, the point of apex being to the south. It is occupied by three separate and distinct buildings built at different times. None of the work, labor or materials mentioned in plaintiff's complaint was done or were furnished in that one of said three different buildings, situated on the most northerly part of said real estate. The other two of said buildings situated on said real estate, were at all times in said complaint and in these findings mentioned, occupied in different parts, by the firm of George Hitz and Co., George H. Mueller and Co. and The Indianapolis Brewing Co., respectively.

(4) About June 14, 1909, the defendants herein, John M. Judah, acting for and on behalf of the owners of said real estate, and the plaintiff entered into a verbal contract,

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by the terms whereof the plaintiff agreed to sell, furnish and install in the said building located on the said real estate, certain electrical wiring and other electrical apparatus, and the said defendant agreed to pay the plaintiff the reasonable value of the materials furnished and labor rendered. Plaintiff, pursuant to such contract thereafter, sold and furnished to defendants certain electrical wiring and electrical apparatus and rendered labor in the installation thereof in said building all of the reasonable value of \$455.32. The other facts found are hereinafter set out in so far as they are deemed necessary to an understanding of the questions discussed.

Appellant contends that the finding is insufficient in that it fails to find that the appellants were the owners of the real estate on which the building in question is lo-

5. cated; that the finding that the real estate in question was left by will to appellants in 1884 is not equivalent to a finding of present ownership. The ownership of such real estate was one of the facts necessary to be found under the issues, and appellants are correct in their conten-

6. tion that the special finding must cover all the facts essential to appellee's recovery, under the issues tendered by his complaint. *Krug v. Davis* (1885), 101 Ind. 75, 76; *Town of Freedom v. Norris* (1891), 128 Ind. 377, 384, 27 N. E. 869; *Cleveland, etc., R. Co. v. Moneyhun* (1896), 146 Ind. 147, 152, 44 N. E. 1106, 34 L. R. A. 141; *Sweetser v. Snodgrass* (1893), 7 Ind. App. 609, 611, 34 N. E. 842; *Minnich v. Darling* (1894), 8 Ind. App. 539, 546, 36 N. E. 173. It is also true that the failure to find any material fact is the equivalent of a finding against the party upon whom rests the burden of proving such fact. *Quill v. Gallivan* (1886), 108 Ind. 235, 237, 9 N. E. 99; *Durflinger v. Baker* (1898), 149 Ind. 375, 378, 49 N. E. 276; *State Bank v. Backus* (1903), 160 Ind. 682, 693, 67 N. E. 512; *Metropolitan Life Ins. Co. v. Bowser* (1898), 20 Ind. App. 557, 568, 50 N. E. 86. It must be remembered, however, in this connection,

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that where the primary facts found lead to but one
 7. conclusion, or where the facts found are of such a character that they necessitate the inference of an ultimate fact, such ultimate fact will be inferred and treated as found. *Mayer v. C. P. Lesh Paper Co.* (1910), 45 Ind. App. 250, 254, 89 N. E. 894, 90 N. E. 651; *Indiana Trust Co. v. Byram* (1905), 36 Ind. App. 6, 10, 72 N. E. 670, 73 N. E. 1094; *De Pauw Plate Glass Co. v. City of Alexandria* (1899), 152 Ind. 443, 452, 52 N. E. 608. The intendments and presumptions are in favor of the finding rather
 8. than against it, and in ascertaining its meaning and effect, it must be read as a whole and if, when so read, it can be said to sustain the conclusions of law stated thereon, no error can be successfully predicated on the exceptions to such conclusions. *Mount v. Board, etc.* (1907), 168 Ind. 661, 666, 80 N. E. 629, 14 L. R. A. (N. S.) 483; *Cleveland, etc., R. Co. v. Closser* (1890), 126 Ind. 348, 367, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593; *Kedey v. Petty* (1899), 153 Ind. 179, 185, 54 N. E. 798.

When the finding in this case is read in its entirety, it is disclosed that the court in addition to finding that Harriet Judah was the owner of the real estate on May 23,
 9. 1884, when she died leaving a will by the terms of which she left such real estate to appellants as trustees and devisees, further finds that John M. Judah acting for and on behalf of the *owners* of said real estate entered into a contract for the material and labor herein involved; that pursuant to such contract the *plaintiff* furnished the *defendants* with such labor and material; that the “*defendants* accepted said repairs, and the sum of \$63.43 was paid on the account by the *tenants* of said *defendants* * * *; that said *defendants* tendered to plaintiff * * * \$218 in full payment of plaintiff’s said claim against *defendants* * * *; that *defendants* offered to pay to plaintiff said sum of \$218 in full payment of plaintiff’s claim; that *defendants* have paid into court for the use of the plaintiff said sum of

* * * \$218 * * * ; that there remains due and unpaid at the time of the commencement of this action *from the defendants* herein to the plaintiff *on account of the sale, furnishing and installation of the aforesaid wiring and electrical material in said building* the sum of \$391.89.” (Our italics.) One inference alone can be drawn from this combination of facts, viz., that appellants as the trustees and devisees of Harriet Judah became the owners and managers of said real estate and continued as such and rented it and contracted for these improvements thereon, received and accepted such improvements as such owners, and offered and tendered payment of the amount which they claimed to be due thereon; but a dispute arising over the amount due this suit followed; that appellants still recognizing their liability as owners of such real estate, brought their tender into court, and litigated the difference between the tender made and the amount sought to be recovered by appellee. Under such a finding of facts it would be a legal absurdity to hold that the judgment of the trial court should be reversed because such court did not in express words find the ultimate fact of present ownership of the real estate in question.

It is further urged against the special finding that it fails to state or find that any work or material was furnished for any *building* or that any *building* was repaired. This

10. objection is met by the language of the finding above set out, and by the decisions herein cited which authorize such inferences as the facts found make necessary.

It is insisted that the finding states that the work herein sued for was completed and the electrical apparatus installed on July 2, 1909, and that appellee’s notice of his intention to hold a lien was not given until September 14, 1909, and hence was not within the 60 days provided by the statute. The answer to this contention is that the finding on which appellants rely as fixing the date of the filing of such notice finds that it was filed “on the fourteenth day of September,

1909, and *within the sixty days from the date on which plaintiff completed the installation and wiring of said electrical apparatus in the said buildings.*" (Our italics.)

The exhibit filed with the complaint shows a number 11. of items of materials and labor furnished during the month of July and after the second day thereof, among which are several items of labor on the 22nd day of said month. This clearly indicates that the finding that the work was completed and electrical apparatus installed on July 2, 1909, was an error in date. The evidence in the case is not before us, and, in view of its absence, and the dates shown by the exhibit filed with the complaint, we think the presumption which this court indulges in favor of the correctness of the proceedings below, authorizes us to treat the finding that the work was completed on July 2, simply as an error in date, and regard the ultimate fact found by the court, that such work "was completed within the sixty days" as controlling. This conclusion is supported by authority. *Clark v. State, ex rel.* (1890), 125 Ind. 1, 24 N. E. 744; *Smith v. Blair* (1893), 133 Ind. 370, 32 N. E. 1123; *Crawford v. Anderson* (1891), 129 Ind. 117, 119, 28 N. E. 314; *Smith v. James* (1892), 131 Ind. 131, 133, 30 N. E. 902; *Behler v. Ackley* (1909), 173 Ind. 173, 178, 180, 89 N. E. 877. None of the appellants' contentions thus far discussed, go to the merits of this controversy but are all, we think, of that technical character which fall within both the letter and spirit of §§407, 700 Burns 1908, §398, 658 R. S. 1881, which were intended to and by their language do inhibit a reversal on such grounds.

Finally it is very earnestly contended by appellants that, inasmuch as the third finding, before indicated herein expressly finds that the real estate in question is occupied by three separate and distinct buildings built at different times, and that none of the work, labor or materials mentioned in the complaint was done or were furnished on one of said three buildings, that the findings do

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not support the conclusion of law that the appellee “has a valid lien on the said real estate.” In support of this contention appellants rely on and quote from the cases of *Hill v. Ryan* (1876), 54 Ind. 118; *Hill v. Braden* (1876), 54 Ind. 72; *Wilkerson v. Rust* (1877), 57 Ind. 172, and *McGrew v. McCarty* (1881), 78 Ind. 496. The facts in each of those cases and the statute upon which the several liens asserted were based, are so different that they can have little or no controlling influence on the question here presented. The facts here found show that the labor and material for which a recovery is asked, were furnished directly to appellant and all put into a building or buildings standing on one and the same undivided parcel or tract of real estate, to wit: Lot number 7 in square 64 of the city of Indianapolis except, etc. Section 1 of the act under which the lien in suit is created provides that such lien shall extend to “the interest of the owner of the lot or parcel of land on which it [the structure] stands or *with which it is connected.*” (Our italics.) Acts 1909 p. 295. The act, on which the cases relied on by appellants were predicated, omitted the italicized words just quoted. Section 2 of the act of 1909 (Acts 1909 p. 295), further provides that “The entire land upon which any such building, erection or other improvement is situated *including that portion not covered therewith shall be subject to lien.*” (Our italics.) We think it clear that, under the provisions of the act here involved, the court was authorized in declaring the lien on the entire parcel of real estate on which the building or buildings, upon which the repairs were made, were located. We do not mean to hold that an issue might not be tendered by the pleadings under which proof would be authorized justifying the court in restricting such lien to a subdivision of a lot or parcel of land made by the owner before the erection of his buildings thereon, but under the issues here tendered, and the facts found thereunder, we think the act in question justified the trial court in declaring the lien on the indivisible lot or portion

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of land on which the buildings in question were located. *Premier Steel Co. v. McElwaine-Richards Co.* (1896), 144 Ind. 614, 619, 43 N. E. 876, and quotations from "Jones on Liens" there approved; *City of Crawfordsville v. Barr* (1879), 65 Ind. 367, 371; *Stephens v. Duffy* (1908), 41 Ind. App. 385, 386, 81 N. E. 1154, 83 N. E. 268; *Miller v. Schmidt* (1901), 67 N. Y. Supp. 1077; *Salt Lake, etc., Co. v. Ibeex, etc., Co.* (1897), 15 Utah 440, 49 Pac. 768, 62 Am. St. 944 and authorities there cited; *Bergsma v. Dewey* (1891), 46 Minn. 357, 49 N. W. 57, 58; 27 Cyc. 224-226 and authorities there cited.

Other alleged errors of a technical character are presented by appellants which are controlled by the principles and decisions herein referred to in our discussion of similar questions. We find no reversible error in the record.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 1039. See, also, under (1, 2) 27 Cyc. 376; (3) 31 Cyc. 48, 79; (4) 27 Cyc. 375; (5) 27 Cyc. 415; (6) 38 Cyc. 1968, 1985; (7) 38 Cyc. 1980; (8, 11) 3 Cyc. 310; (9, 10) 27 Cyc. 425-428. As to lien for material furnished "to be used in", etc., but not, in fact, used, see 64 Am. Dec. 678.

COLLINS ET AL. v. STATE OF INDIANA.

[No. 8,532. Filed May 29, 1913.]

1. APPEAL.—*Assignment of Errors.*—*Form.*—*Sufficiency.*—An assignment of errors which does not contain the full names of all the parties, or which contains the name of the appellee before the abbreviation "vs." in the title of the cause, instead of that of the appellant, is not in compliance with the rules of court and is insufficient. p. 489.
2. APPEAL.—*Determination.*—*Parties.*—An appeal cannot be determined on its merits, unless the parties to the judgment appealed from are before the court. p. 489.
3. APPEAL.—*Jurisdiction.*—*Assignment of Errors.*—The assignment of errors is the appellant's complaint, and jurisdiction is acquired only over the parties whose names appear therein. p. 489.

From Juvenile Court of Marion County (7036a); *Newton M. Taylor*, Judge.

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Prosecution by the State of Indiana against Samuel Collins and others. From a judgment of conviction, the defendants appeal. *Appeal dismissed.*

W. S. Henry, for appellants.

Thomas M. Honan, Attorney-General, and *Thomas H. Branaman*, for the State.

ADAMS, C. J.—The amended assignment of errors in this appeal is entitled “*State of Indiana vs. Samuel Collins, et al.*” This is an insufficient assignment. Rule 6 of

1. this court requires that “the assignment of errors shall contain the full names of all the parties.” This rule was not observed, nor was the general rule of appellate procedure, which requires the names of appellants to be written before the abbreviation “vs.” and the names of appellees after said abbreviation, instead of the reverse, as was done in this case. *Barnett v. Bromley Mfg. Co.* (1898), 149 Ind. 606, 49 N. E. 160.

A cause cannot be determined on its merits unless the parties to the judgment appealed from are before the court.

Big Four Bldg., etc., Assn. v. Olcott (1896), 146 Ind.

2. 176, 45 N. E. 64; *Barnett v. Bromley Mfg. Co., supra.*

The assignment of errors in this court constitutes the appellant’s complaint, and the court only acquires

3. jurisdiction over the parties whose names appear therein. *Snyder v. State, ex rel.* (1890), 124 Ind. 335, 24 N. E. 891; *Bozeman v. Cale* (1894), 139 Ind. 187, 35 N. E. 828; *Hutts v. Martin* (1895), 141 Ind. 701, 41 N. E. 329; Thornton, Ind. Prac. Code §655 n. 1; Elliott, App. Proc. §§300, 322; Ewbank’s Manual §§126, 226.

The appeal is dismissed.

NOTE.—Reported in 101 N. E. 1022. See, also, under (1) 2 Cyc. 985; (2) 2 Cyc. 756; (3) 2 Cyc. 980, 985. For a discussion of “et al.” in the place of names in process, pleading, etc., see 14 Ann. Cas. 571.

TIMMONS v. KENRICK.

[No. 7,978. Filed June 3, 1913.]

1. **ASSAULT AND BATTERY.—Actions.—Instructions.**—An instruction to return a verdict for plaintiff if the jury found that defendant requested plaintiff to have sexual intercourse with him, and in a rude and insolent manner, and with force, took hold of plaintiff, hugged and kissed her, felt her breasts and attempted to remove her clothing, and during all of that time implored her to yield to his solicitation, all of which was against her will, was objectionable in failing to tell the jury that the assault and battery must be unlawful, since the facts stated in the instruction if found to be true, constitute an assault and battery, and an assault and battery is necessarily unlawful. p. 491.
2. **TRIAL.—Province of Court and Jury.**—In the trial of a civil cause it is the province of the jury to ascertain the facts, and to determine whether such facts are unlawful, since it is for the court to determine the law of the case. p. 492.
3. **ASSAULT AND BATTERY.—Elements of Damage.—Instruction.**—In an action for assault and battery, where there was no evidence that plaintiff had suffered loss of social position or injury to reputation, an instruction on the question of damages in an action for assault and battery which told the jury to assess damages as the jurors thought plaintiff sustained as the direct result of defendant's conduct without limiting the jury to a consideration of the damages shown by the evidence, and which stated, among other things, that plaintiff may recover for loss of social position and injury to her reputation, was erroneous. (*Wolf v. Trinkel* [1885], 108 Ind. 355, and *Kelley v. Kelley* [1888] 8 Ind. App., 606, distinguished.) pp. 492, 493.
4. **APPEAL.—Review.—Instructions.—Applicability to Evidence.**—Instructions must be applicable to the evidence, and the giving of one which is not applicable is reversible error, unless it affirmatively appears that no harm resulted therefrom. p. 493.
5. **ASSAULT AND BATTERY.—Evidence.—Presumptions.—Reputation.—Social Position.**—It does not necessarily follow that one injured by an assault and battery has thereby suffered injury to reputation or loss of social position, but such loss, like other elements of damage, must be shown by evidence. p. 493.

From Tippecanoe Circuit Court; *Richard P. DeHaven*, Judge.

Action by Martha B. Kenrick against Jacob D. Timmons.

From a judgment for plaintiff, the defendant appeals. *Reversed.*

Reynolds & Sills and *Thompson & McAdams*, for appellant.

Robert C. Pollard, *Charles R. Pollard, Jr.*, and *Joseph B. Ross*, for appellee.

IBACH, C. J.—Upon trial by jury, appellee recovered \$675 for an alleged unlawful assault by appellant upon her person. The only errors presented to this court are in the giving of instructions Nos. 4 and 5 at appellee's request.

Instruction No. 4 is in the following words: "If the jury believe and find from the evidence that on June 2, 1910, the defendant went to the home of plaintiff in the

1. town of Pittsburg, Carroll County, Indiana, and then and there requested said plaintiff to have sexual intercourse with him, and then and there, in a rude and insolent manner, and with force, took hold of plaintiff, and hugged her, and kissed her, and felt her breasts, and attempted to raise her clothing, during all of which time said defendant implored plaintiff to yield to his solicitations and have sexual intercourse, all of which was against the will of said plaintiff, then your verdict will be for the plaintiff."

It is claimed that this instruction is erroneous, because it does not tell the jury that the assault and battery must be unlawful. The instruction is not open to this objection. By it the jury was told that if it found certain facts from the evidence, it must find for the plaintiff, that is, it must find that the allegations of her complaint averring an unlawful assault and battery had been sustained. An assault and battery is necessarily unlawful, and when the facts constituting an assault and battery are shown, it is a mere redundant conclusion to state that the assault and battery is unlawful. There can be no doubt that the facts stated in the instruction would constitute an assault and battery. The jury was told that if it found certain facts, its verdict should be for the plaintiff. This was equivalent to telling

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it that such acts were unlawful. The province of the
2. jury in a civil case is to ascertain the facts, not to
decide whether certain acts are unlawful. It was the
province of the court to declare the law of the case and it
made correctly the conclusion of law that a state of facts
such as that set out in the instruction would constitute an
unlawful assault and battery. It had previously in other
instructions given as a part of the same series with the one
complained of, defined assault and battery, telling the jury
that any injury actually done to the person of another in
a rude and insolent manner, however slight the touching
of the person, was unlawful, and an assault and battery.
There was no error in giving instruction No. 4.

Instruction No. 5 is in the following words: "If you
find for the plaintiff, you will assess in her favor such dam-
ages, within the amount claimed, as you think she has
3. sustained, and which will be a compensation to her
for any loss or injury occasioned, which are the direct
result of said defendant's conduct. In arriving at com-
pensatory damages, the jury are not necessarily restricted
to the naked pecuniary loss; for besides damages for pecu-
niary loss or injury, the jury may allow such as are the direct
consequence of the act complained of, for injury to Mrs.
Martha B. Kenrick's good repute, her social position, for
physical suffering, bodily pain, anguish of mind, sense of
shame, humiliation, and loss of honor." This was the only
instruction on the measure of damages given. Appellant
does not question that the elements of damages enumerated
are proper under the averments of the complaint, but he
claims that the instruction is erroneous, in that it does not
restrict the jury to the consideration of the damage shown
by the evidence, if any was shown; and he asserts that there
was no testimony of any injury to appellee's good repute,
or her social position, or of any loss of honor, nor any tes-
timony from which such injury could be inferred. The
general rule is that instructions must be applicable to the

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evidence, and that if an instruction is given concerning a fact or state of facts, of which there is no evidence, it is reversible error, unless it appears affirmatively that the party complaining of the instruction was not harmed. *Southern R. Co. v. Crone* (1912), 51 Ind. App.

330, 99 N. E. 762; *Cleveland, etc., R. Co. v. Case* (1910), 174 Ind. 369, 91 N. E. 238, and authorities cited; *Summerlot v. Hamilton* (1889), 121 Ind. 87, 22 N. E. 973. In

5. the present case there was not a syllable of evidence tending to show any loss of social position on the part of the plaintiff, nor was there a syllable of evidence as

3. to her loss of reputation, nor as to what her reputation was. The presumption of law is that her reputation was good, and we must continue to presume that it has not been affected, in the absence of proof to the contrary. Social position is a matter to be established by proof. It does not necessarily follow from the fact that an assault and battery like that charged in the complaint has been committed, that the person assaulted has lost in reputation, social standing, or honor. Such loss is to be established like other elements of damage, by evidence, not necessarily direct evidence as to the amount of such damage, but at least evidence from which the jury could infer reasonably that there had been such loss. See, also, *Totten v. Totten* (1912), 172 Mich. 565, 138 N. W. 257, and *Sletten v. Madison* (1904), 122 Wis. 251, 99 N. W. 1020. But the jury in the present case was not restricted to the evidence in awarding damages. It was told to assess such damages as its members *thought she sustained* as the direct results of defendant's conduct, but was not limited to such damage as was shown in evidence. By this instruction the members of the jury were permitted to indulge in inference and speculation as to the amount of damages sustained, without limitation except the bounds of their own thoughts. We believe that instruction No. 5 was misleading to the jury, in authorizing it to consider elements of damage upon

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which there was no evidence, and in not limiting it in its consideration of the amount of damage to the damage shown in evidence. We can not say that appellant was not harmed by the instruction, hence its giving constitutes reversible error.

Appellee relies upon the cases of *Wolf v. Trinkel* (1885), 103 Ind. 355, 3 N. E. 110; and *Kelley v. Kelley* (1894), 8 Ind. App. 606, 34 N. E. 1009, as supporting this instruction. We must admit that these cases lend strong color to her contention, yet we do not believe them controlling, in view of the universal rule that instructions must be applicable to the evidence. In the case of *Wolf v. Trinkel*, *supra*, instructions similar to the one under discussion were given, but it does not appear that the objection here considered was there presented to the court, nor does it appear that the evidence did not fully justify the giving of the instructions. In the case of *Kelley v. Kelley*, the instruction expressly restricted the jury to the consideration of certain elements of damage, if such damage *was shown*. Thus the jury was restricted to the evidence in its consideration of the amount of damages. Though the court in its opinion states that no evidence was introduced as to the extent of the damage for any of the injurious results, the effect of the opinion is only that the jury had a right to consider all the elements of damage without special proof as to the amount, and the impression to be gained from reading the opinion is that the evidence before the jury was such that it could find therefrom damages as to all the injurious results enumerated as elements of damage. In the present case there was no evidence from which the jury could find any loss of good repute, or of social position.

The judgment is reversed, and the cause remanded for new trial.

NOTE.—Reported in 102 N. E. 52. See, also, under (1) 3 Cyc. 1100; (2) 38 Cyc. 1511; (3) 3 Cyc. 1101; (4) 38 Cyc. 1612, 1617; (5) 3 Cyc. 1086, 1091.

STATE OF INDIANA, EX REL. BOARD OF COMMISSIONERS OF THE COUNTY OF MARION,
v. QUILL ET AL.

[No. 8,601. Filed June 3, 1913.]

1. **CONSTITUTIONAL LAW.—*Naturalization of Aliens.—Power of Congress.***—Under §8, Art. 1 of the Federal Constitution, the Congress has exclusive jurisdiction over the subject of the naturalizations of aliens. p. 497.
2. **ALIENS.—*Naturalization.—Statutes.—“Fees.”***—The amount of money retained by the clerk of the circuit court under the provisions of the federal naturalization statute (Act of Congress of June 29, 1906, 34 U. S. Stat. at Large C. 3592), is within the meaning of the term “fee”, since the charge for services required of the clerk by said act implies a fee and is specifically designated therein as a fee. p. 498.
3. **STATUTES.—*Conflict With Act of Congress.—Validity.***—A state law which is in conflict with an act of Congress is invalid. p. 498.
4. **ALIENS.—*Naturalization.—Fees.—Statutes.—Repeal.***—That part of the fee and salary law of Indiana relating to the fees of clerks in naturalization cases (§7324 Burns 1908, Acts 1895 p. 319, §114) is in effect repealed by the Act of Congress of June 29, 1906, 34 U. S. Stat. at Large C. 3592. p. 498.
5. **CLERKS OF COURTS.—*Compensation and Fees.—Statutes.***—Under §7324 Burns 1908, Acts 1895 p. 319, §114, the clerk of the circuit court is not required to account to the county for all the emoluments of his office, but only for such fees as are provided for in the statutory fee bills. p. 499.
6. **ALIENS.—*Naturalization.—Ownership of Fees.***—In the naturalization of aliens under the Act of Congress of June 29, 1906, 34 U. S. Stat. at Large C. 3592, the circuit courts of the State act as agencies of the Federal Government, and the officers of such courts are federal officers in that behalf, so that the fees which the clerk of the circuit court is authorized to retain out of the charges provided for services performed under that act belong to him personally and are not controlled by the provisions of the State fee and salary law. p. 500.

From Marion Circuit Court (21,746); *Charles Remster*, Judge.

Action by the State of Indiana, on the relation of the Board of Commissioners of the County of Marion, against

State, ex rel. v. Quill—53 Ind. App. 495.

Leonard M. Quill and others. From a judgment for defendants, the relator appeals. *Affirmed.*

Thomas M. Honan, Attorney-General, *Edwin Corr*, *Thomas H. Branaman* and *James E. McCullough*, for appellant.

Martin M. Hugg, for appellees.

ADAMS, C. J.—The error assigned in this appeal is predicated on the sustaining of appellee's demurrer to appellant's complaint. The action was brought against appellee Quill, as clerk of the Marion Circuit Court, and his bondsmen, to recover \$1289.50, being one-half of fees collected by him in proceedings for the naturalization of aliens, and not turned over to the county of Marion.

The single question presented by the record and briefs is: Do the fees so collected and retained by the clerk belong to him, or do such fees belong to the county of Marion? The question is one of first impression in this State, and is not free from doubt. We believe, however, that the better reason, as well as the weight of authority is with the appellee. By §7226 Burns 1908, Acts 1895 p. 319, §21, it is provided that the county officers named in the fee and salary act, shall be entitled to receive for their services the compensation specified in the act, and shall receive no other compensation whatever. By §7353 Burns 1908, Acts 1895 p. 319, §136, it is provided that nothing herein shall be construed as to allow any of the officers named the salary provided and also the fees required to be taxed, except as otherwise specified. Section 7324 Burns 1908, Acts 1895 p. 319, being §114 of the fee and salary act, in force June 28, 1895, is in part as follows: "The clerks of the circuit, criminal and superior courts of this state on behalf of the county in which said courts are held, shall tax and charge upon proper books, to be kept in their offices for that purpose, the fees and amounts provided by law, which amounts so taxed shall be designated as 'clerk's costs,' but they shall

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in no sense belong to and be the property of the clerk, but shall belong to and be the property of the county. * * *

For recording and indexing each declaration of intention of any person desiring naturalization, administering the oath of abjuration and issuing certified copy thereof under official seal to applicant, one dollar. For making and indexing record of the naturalization of any person, administering oath of abjuration and issuing certificate of naturalization with official attestation and seal attached one dollar.

* * * '' By §236 Burns 1908, §236 R. S. 1881, all statutes of the United States in force and relating to the subjects over which Congress has the power to legislate for the states, and not inconsistent with the Constitution of the United States, are declared to be a part of the laws governing this State. Under §8, Art. 1 of the Federal Con-

1. stitution, it is provided that Congress shall have power to establish uniform rules of naturalization throughout the United States, and to make all laws which shall be necessary and proper for carrying into execution such powers. It must follow that in the exercise of the power thus conferred, the Congress has exclusive jurisdiction over the subject of the naturalization of aliens. By the Act of Congress of June 29, 1906, 34 U. S. Stat. at Large C. 3592, jurisdiction in the naturalization of aliens was conferred on state courts of record. It is provided by said act (§9055k Burns 1908, Acts of Congress of June 29, 1906), that "The clerk of every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding: For receiving and filing a declaration of the intention and issuing a duplicate thereof, one dollar. For making, filing, and docketing the petition of an alien for admission as a citizen of the United States, and for the final hearing thereon, two dollars; for entering the final order and issuance of the certificate of citizenship thereunder, if granted, two dollars. The clerk of any court

collecting such fees is authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they shall render the Bureau of Immigration and Naturalization, and pay over to such Bureau within thirty days from the close of each quarter of each fiscal year. * * * ” It is also provided that clerks shall be permitted to retain one-half of the fees in any fiscal year up to the sum of \$3,000; that all such fees received by clerks in excess shall be accounted for and paid over to said Bureau. It is further provided that clerks shall pay all additional clerical force required in performing the duties imposed, from fees received in naturalization proceedings. The forms used in naturalization cases are set out in the act, all blanks are furnished by the Federal Bureau of Immigration and Naturalization, and clerks are required to account to said bureau for such blanks.

It is not seriously contended by appellee that the
2. amount retained by the clerk and sued for in this action does not fall within the meaning of the term “fees.” The charge for services required by the federal act to be performed by clerks of state courts implies a fee, and is specifically designated in the act as a fee. But it is contended by appellee, that, the fees in naturalization cases being authorized by the federal statute, the clerk becomes the agent of the United States in rendering such services, and is not bound by a state law in regard to the disposition of such fees.

It is well settled that a state law which is in con-
3. flict with an act of Congress is invalid. It follows, therefore, that the fee and salary law of Indiana,
4. as to clerk’s fees in naturalization cases, enacted in 1895, has been repealed by the federal act of 1906. It must also follow that since its enactment, the latter act constitutes the only law in this State on the subject of fees

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in such cases. *County of Hampden v. Morris* (1911), 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912 A 815; *Eldredge v. Salt Lake County* (1910), 37 Utah 188, 106 Pac. 939; *Fields v. Multnomah County* (1913), 64 Or. 117, 128 Pac.

1045. While the language employed in the Indiana

5. act, §7324, *supra*, is broad and comprehensive, yet our Supreme Court has held that a county officer is not required to account to the county for all compensation received by him by virtue of his office; that the act of 1895 does not require a county auditor to charge the amount allowed by a former statute for his services as a member of the board of review, as a fee in favor of the county. *Seiler v. State, ex rel.* (1903), 160 Ind. 605, 615, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448. Again, in *State, ex rel. v. Flynn* (1903), 161 Ind. 554, 69 N. E. 159, it was held that the services of the clerk of the circuit court, in preparing bar dockets and his per diem allowance for attending court are not fees within the meaning of the act of 1895, but may be retained by the clerk as his own. The court, at page 577, said: "It is only the amount of fees which the clerk is to tax and charge as 'clerk's costs' upon proper books as the property of the county, and not all allowances from whatever source derived." From the rule announced in the foregoing cases, it would seem to be the settled law of this State that a public officer, whose compensation is fixed by the fee and salary law, is not required to account to the county for all the emoluments of his office, but only for such fees as are provided for in the statutory fee bills. We think, however, the averments of the complaint in the case at bar disclose a state of facts presenting a question the determination of which must be conclusive of this appeal. That question pertains to the legal status of appellee Quill in the performance of the service required of him in naturalization cases by the federal statute.

As we have seen, the power to establish uniform rules of naturalization throughout the United States is lodged exclu-

sively in the Congress. In the exercise of that power, 6. laws have been enacted covering in great detail every phase of the subject, and the administration of such laws has been committed not only to the federal courts but to the state courts as well. It is obvious that when a state court assumes jurisdiction conferred by a federal statute, such jurisdiction must be exercised in conformity with the statute conferring the same. The court derives no authority from any other source. It becomes a federal court for the purpose of naturalizing aliens, or at least an agency of the Federal Government, and the officers of the court are necessarily the officers of the Federal Government in that behalf. To this date, five cases have been reported involving facts identical with the facts in the case at bar. These cases are *Eldredge v. Salt Lake County*, *supra*; *County of Hampden v. Morris*, *supra*; *Fields v. Multnomah County*, *supra*; *San Francisco v. Mulcrevy* (1910), 15 Cal. App. 11, 113 Pac. 339; and *Barron County v. Beckwith* (1910), 142 Wis. 519, 124 N. W. 1030, 30 L. R. A. (N. S.) 810, 135 Am. St. 1079. In *County of Hampden v. Morris*, *supra*, the court said: "The fees prescribed by the federal statute are not all the same as those prescribed by the law of Massachusetts under which naturalization was previously conducted. The disposition of the fees is not the same under the two statutes, and the methods of procedure are very different. As all authority for action is derived from the federal law, this authority permits only such action as that law prescribes. The fees must be regulated by that law, and unless the disposition of them is a matter not fairly belonging to the general subject referred to in the Constitution, the disposition of the fees must also be as therein provided. We are of the opinion that the disposition of the fees, as well as the amount of them, may properly be regulated by congressional legislation, as incidental to the establishment of a system with a view to the accomplishment of good results." The Utah and Oregon cases are to the same general effect. The

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California case seems to turn on a provision of the charter of the city and county of San Francisco, which required that the county clerk "shall pay all money coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after receipt of the same." In the opinion the Utah case was distinguished, the court saying: "It does not appear from the opinion to have been a condition of the bond, or the duty of the clerk, to perform all official duties that may have been imposed upon him by law, nor did the statute require the clerk to pay all moneys, 'no matter from what source derived,' into the treasury of the county." In the Wisconsin case, it is stated that the county board by resolution "provided that all such fees, *per diem* and compensation for services rendered, should be turned over to the county treasurer, according to law." The court, however, took a broad view of the case, and in the discussion fairly sustained the position of appellant in this case, although admitting that the question presented was one not easy of solution. Upon the clear weight of authority, we think the complaint before us does not state a cause of action, and that the trial court did not err in sustaining the demurrer thereto.

The judgment is affirmed.

NOTE.—Reported in 102 N. E. 106. See, also, under (2) 2 Cyc. 111; (3) 8 Cyc. 773; 36 Cyc. 944; (5) 7 Cyc. 235.

MILLER ET AL. v. ARMSTRONG-LANDON COMPANY.

[No. 8,010. Filed June 4, 1913.]

1. **APPEAL — Questions Reviewable. — Motion for New Trial. — Record. — Evidence.**—Where no reference is made in appellant's brief to the filing of a bill of exceptions, and no order book entry of the filing of such bill is disclosed by the record, or by the clerk's certificate, it must be held that the evidence is not in the record, and no question is presented on the overruling of a mo-

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tion for new trial grounded on the alleged insufficiency of the evidence. p. 503.

2. APPEAL.—*Assignment of Errors.—General Assignment.—Effect.*
—No error is available under a general assignment of error as to the conclusions of law, if any one of the conclusions is correct. p. 503.

From the Howard Circuit Court; *William C. Purdum*, Judge.

Action by the Armstrong-Landon Company against Henrietta Miller and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Milton Bell and Joseph C. Herron, for appellants.

Blackledge, Wolf & Barnes, for appellee.

SHEA, J.—Suit by appellee to foreclose a mechanic's lien against appellants, Henrietta Miller and Charles G. Miller. Appellant, John W. Tash, was made a party to the action to answer as to any interest he might have or claim in the property subject to the lien. The complaint was in four paragraphs, to each of which appellant's separate demurrers were overruled. Answer in general denial. Appellant Tash filed a cross-complaint against Miller and Miller to foreclose a mechanic's lien against them on an account he claimed was owing him by Charles G. Miller, which was answered in general denial. Upon request, the court made a special finding of facts and stated conclusions of law thereon as follows: (1) That appellee is entitled to a personal judgment of \$429.19 (principal and interest) against Charles G. Miller, and \$55.00 attorney's fees, also, foreclosure of the mechanic's lien against Henrietta Miller and Charles G. Miller as to that part of the real estate described in finding No. 30. (2) That cross-complainant, John W. Tash, is entitled to a personal judgment of \$84.29 (principal and interest) against Charles G. Miller, and \$15.00 attorney's fees; also foreclosure of his mechanic's lien against Henrietta Miller and Charles G. Miller upon that part of the real estate described in finding No. 30. (3) That Henrietta

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Miller is entitled to have all of her real estate except the part described in finding No. 30 released from the lien of said mechanic's lien and recover her costs; that all costs are to be taxed against Charles G. Miller and declared a lien upon the real estate described in finding No. 30. Judgment was rendered accordingly.

The errors assigned are the overruling of appellant's motion for a new trial, and error of the court in its conclusions of law upon the facts found. In support of

1. the motion for a new trial it is insisted that the decision of the court is not sustained by sufficient evidence and is contrary to law. Appellee earnestly insists that any question presented by the motion for a new trial can not be considered by this court for the reason that the evidence is not in the record. No reference is made in the brief to the filing of a bill of exceptions. An examination of the record shows no order book entry of the filing of the bill of exceptions, neither does the certificate of the clerk cure the imperfection, or show that a bill of exceptions was filed. Under numerous decisions of this as well as the Supreme Court, it must be held that the evidence is not in the record. *Dreyer v. Hart* (1897), 147 Ind. 604, 609, 47 N. E. 174; *Board, etc. v. Huffman* (1892), 134 Ind. 1; 31 N. E. 570; *De Hart v. Board, etc.* (1896), 143 Ind. 363, 41 N. E. 825; *Elrod v. Purlee* (1905), 165 Ind. 239, 73 N. E. 589, 74 N. E. 1085; *McCormick Harvesting Co. v. Smith* (1899) 21 Ind. App. 617, 619, 52 N. E. 1000, and authorities cited; *Kelso v. Kelso* (1897), 16 Ind. App. 615, 44 N. E. 1013, 45 N. E. 1065.

It is earnestly urged by appellee that the assignment of error as to the conclusions of law is general, and therefore if any one of the conclusions is correct, there is no available error. We concur in this contention. "It is a general rule in this State that when there are several rulings each must be separately challenged, and the exception must be taken to each. Where the objection or excep-

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tion in the court below or assignment of error in this court is joint as to several rulings or acts of the court, the same will fail unless valid as to all of such rulings or acts.” *Saunders v. Montgomery* (1895), 143 Ind. 185, 41 N. E. 453, and numerous authorities cited. No exception was taken or appeal brought from the second conclusion of law for John W. Tash on his cross-complaint. It must therefore be taken as correct, and the general assignment of error overruled.

No available error is presented by this record. Judgment affirmed.

NOTE.—Reported in 102 N. E. 47. See, also, under (1) 3 Cyc. 175; (2) 2 Cyc. 987, 995.

HANLON v. CONRAD-KAMMERER GLUE COMPANY.

[No. 8,011. Filed June 4, 1913.]

1. APPEAL.—*Briefs.—Sufficiency.*—A consideration of questions presented is not barred on the ground that appellant’s brief does not comply with Rule 22 of the Supreme and Appellate Courts, where the brief evidences a good faith effort to and does substantially comply therewith. p. 506.
2. COVENANTS.—*Warranty.—Breach.—Damages.*—While upon a total breach of covenant a purchaser may generally recover the whole consideration money, where the breach is only partial he may recover *pro tanto* only, and where there is a failure of title to one of several tracts conveyed by the same deed, the vendee can recover the consideration paid for such particular tract. pp. 506, 509.
3. COVENANTS.—*Breach of Warranty.—Complaint.—Sufficiency.*—Where a deed contained two separate independent clauses of conveyance, the first of which warranted title and mentioned a consideration, and the second of which conveyed and quitclaimed with no consideration expressed therein, a complaint for a breach of the warranty, alleging that defendants, in consideration of the sum of money mentioned in the first clause, sold and conveyed the land described in such first clause, the title to which was defective, is sufficient, as against a demurrer, to overcome any possible presumption that the consideration expressed was intended as a consideration for all the land conveyed, and to present the question as one of fact for the jury. p. 507, 508.

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4. **DEEDS.—Consideration.—Evidence.**—The consideration expressed in a deed is always subject to explanation, and when not correctly expressed, the true consideration may be alleged and proved. p. 508.
5. **DEEDS.—Execution of Deed to Correct Prior Deed.—Effect.**—A deed of correction relates back to the time of the original conveyance and takes the place of it, and the consideration of the first deed is the consideration for the subsequent deed. p. 509.
6. **APPEAL.—Review.—Harmless Error.—Ruling on Demurrer to Reply.**—Where a paragraph of reply amounted to no more than an argumentative denial, and the facts pleaded therein were admissible under the general denial, overruling a demurrer thereto was harmless. p. 509.
7. **TRIAL.—Pleadings.—Amendment to Conform to Proof.—Discretion of Court.**—By §§400, 403, 405 Burns 1908, §§391, 394, 396 R. S. 1881, the trial court has a very wide discretion in the matter of amendments of the pleadings to conform to the proof. p. 510.
8. **APPEAL.—Review.—Discretion of Court.—Amendment of Pleadings.**—Where the record shows no application by appellant for a continuance after the court permitted the amendment of the complaint to conform to the proof, and the evidence is not in the record, it cannot be said that permitting such amendment was an abuse of the court's discretion. p. 510.

From Floyd Circuit Court; *William C. Utz*, Judge.

Action by the Conrad-Kammerer Glue Company against Thomas Hanlon. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Alexander Dowling, for appellant.

Stotsenburg & Weathers and *George H. Hester*, for appellee.

HOTTEL, P. J.—This was an action by appellee to recover damages for an alleged breach of a covenant of warranty contained in a deed executed by appellant and wife to appellee. The complaint is in a single paragraph, a demurrer to which was overruled. There was an answer in denial, and a special answer setting up that the deed mentioned in the complaint was executed without any consideration. To this answer, after a demurrer thereto had been overruled, the appellee filed a general denial and a special reply. A demurrer to the special reply was overruled. There was

trial by jury which resulted in a verdict for appellee. Judgment was rendered on the verdict and from such judgment this appeal is prosecuted.

The errors separately assigned and relied on present for our consideration the question of the sufficiency of the complaint, and the special reply to withstand the respective demurrers filed thereto, and the ruling of the court in permitting appellee to amend its complaint after the close of the evidence, by substituting the name of the Baltimore and Ohio Southwestern Railroad Company for the name, and in the place of the Baltimore and Ohio Southwestern Railway Company, as the true and paramount owner of the tract of land alleged to have been conveyed by the appellant to the

appellee. Appellee insists, that such questions are

1. not presented because of the failure of appellant, in the preparation of his brief, to comply with Rule 22 of this court. We think such brief evidences a good faith effort to comply with said rule and that there has been such substantial compliance therewith as entitles appellant to a consideration of said questions.

It is urged against the sufficiency of the complaint, that the deed filed as an exhibit therewith shows that for the same consideration the appellant deeded two separate tracts of real estate; that the complaint alleges no defect of title as to the last tract described in such deed, and shows that appellee still retains such tract, and seeks to recover the entire consideration paid for both tracts. It is insisted in effect that the complaint should have alleged either an offer to reconvey such tract in which no defect of title is alleged, or that it should have alleged the value of each tract and asked a recovery for such proportion of the purchase money as the value of the tract in which the title failed bore to the value of the whole premises deeded. It is no doubt

true as appellant contends "that while upon a total

2. breach of * * * covenant a purchaser may, as a general rule, recover the whole consideration money,

so where there is a partial breach he may recover *pro tanto*." Rawle, Covenants 85-87; 11 Cyc. 1159, 1163; *Hoot v. Spade* (1863), 20 Ind. 326, 327; *Moorehead v. Davis* (1883), 92 Ind. 303, 306, and cases there cited; *Doyle v. Brundred* (1899), 189 Pa. St. 113, 119, 120, 41 Atl. 1107; *Lloyd v. Sandusky* (1903), 203 Ill. 621, 629, 68 N. E. 154. It is said in 11 Cyc. 1163: "Where the breach is only as to an aliquot and undivided part of the land attempted to be conveyed the damages are in proportion to the whole consideration paid, as that aliquot part of the land is to the whole thereof."

The weakness of appellant's contention results from

3. his interpretation of the averments of the complaint and the exhibit made part thereof rather than from any misconception or misapplication of the law governing in such cases. While it is true that the deed filed as an exhibit with appellee's complaint shows a single consideration and that two pieces of real estate are conveyed therein, one of which is not mentioned in appellee's complaint, the wording of this deed would indicate that the consideration mentioned was for the first piece described therein alone, and it is the piece described in appellee's complaint. The language of the deed affecting the question under discussion is as follows: "This Indenture, Witnesseth, That Thomas Hanlon and * * * wife, * * * Convey and Warrant unto * * * for the sum of * * * One Thousand Dollars, the receipt of which is hereby acknowledged the real estate in New Albany Township, Floyd County, Indiana, described as follows, to wit:" Here follows a description of the tract described in appellee's complaint and at the end of such description is a period. The deed then proceeds with a second clause of conveyance as follows: "And said grantors convey and quitclaim unto said grantees the real estate in Floyd County, Indiana, bounded as follows." Here follows a description of a second tract not described or referred to in the complaint except by way of

reference to such exhibit. It will be observed that there are two separate independent clauses of conveyance in said deed, the first of which warrants title and contains a consideration of \$1,000 and the second of which conveys and quit-claims with no consideration expressed therein. Conceding without deciding, that it should be presumed that the consideration expressed in the first clause of the deed though separate and independent of said second clause, was intended as an expression of the consideration for the entire tract conveyed by such deed, yet, such consideration is

4. always subject to explanation, and when not correctly expressed in the deed, the true consideration may be alleged and proved. *Louisville, etc., R. Co. v. Renicker* (1893), 8 Ind. App. 404, 413, 35 N. E. 1047; *Cincinnati, etc., R. Co. v. McLain* (1897), 148 Ind. 188, 193, 44 N. E. 306; *Long v. Doxey* (1875), 50 Ind. 385; *Jeffersonville, etc., R. Co. v. Worland* (1875), 50 Ind. 339, 341; *Johnson v. McNabb* (1893), 7 Ind. App. 393, 397, 34 N. E. 667; *Hanover Fire Ins. Co. v. Johnson* (1901), 26 Ind. App. 122, 131, 57 N. E. 277. Appellee in his complaint alleges that

3. on April 9, 1908, appellant claimed to be the owner of the following described real estate in Floyd County, Indiana (here follows a description of the tract first described in said deed alone). The complaint then proceeds as follows: "On said 9th day of April, 1908, said defendants, by their deed of conveyance of that date, duly executed and delivered, in consideration of One Thousand Dollars paid by this plaintiff, sold and conveyed to this plaintiff the said above described real estate in Floyd County, Indiana." It will be observed that the complaint expressly avers that the consideration paid for the tract, the title to which is alleged to be defective, was \$1,000. This averment was admitted by the demurrer to be true and the question which appellant attempts to raise on the complaint, is by its express averments, made a question of fact for the jury to determine under the evidence. Where there is a

failure of title to one of several tracts of land conveyed by the same deed, the vendor can recover the consideration paid for such particular tract. *Wright v. Nipple* (1883), 92 Ind. 310, 314; *Wood v. Bibbins* (1877), 58 Ind. 392, 396; *Wilson v. Peelle* (1881), 78 Ind. 384, 388; *Overhiser v. McCollister* (1857), 10 Ind. 41, 44; *Burton v. Reeds* (1863), 20 Ind. 87; *Lloyd v. Sandusky*, *supra*.

The reply alleged in brief that the appellant represented to appellee that he was the owner of the tract of land described in the complaint, (also described in such reply) and offered to sell the same to appellee for \$1,000, in consideration of which sum appellant agreed to execute to appellee a warranty deed for such tract; that appellee accepted such offer and paid appellant the \$1,000 in consideration of which the appellant executed a deed which is set out in reply. It is then averred that by such deed appellant intended to deed and include in the warranty therein the real estate before described being the same as that set out in the complaint and that which the appellant had undertaken to deed for said sum of \$1,000; that by mutual mistake of the parties such deed covered only a part, etc., and that the deed mentioned in the complaint was made to correct said first deed.

These facts clearly show that the deed filed as an exhibit with the complaint was made to correct a previous deed by which it had been intended to deed the real estate described in the complaint, and that the consideration originally paid for such real estate was \$1,000. A deed of correction relates back to the time of the original conveyance and takes the place of it. *Pittsburgh, etc., R. Co. v. Beck* (1899), 152 Ind. 421, 428, 53 N. E. 439. It follows that the consideration of the first deed was likewise the consideration for the last and that the facts set up in such reply, if necessary to be specially pleaded, were sufficient to avoid appellant's answer of no consideration. Of course, if proof of the facts so pleaded were admissible under the general denial and the reply amounted to

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no more than an argumentative denial of the answer, no harm could have resulted from overruling the demurrer thereto.

Appellant also insists that the deed set out in the reply, like that filed with the complaint, shows but one consideration for the two tracts and urges against the reply the same objections urged against the complaint. The reply avers that the \$1,000 consideration was in fact paid for the tract, the title to which is alleged to be defective, and what we have said in discussing the sufficiency of the complaint applies with equal force to this objection to the reply. It

may be said with reference to the third error before

7. indicated, that the statute gives the trial court a very wide discretion in the matter of amendments of the pleadings to conform to the proof. §§400, 403, 405 Burns 1908, §§391, 394, 396 R. S. 1881; *Cleveland, etc., R. Co. v. Miles* (1904), 162 Ind. 646, 655, 70 N. E. 985; *Citizens St. R. Co. v. Heath* (1902), 29 Ind. App. 395, 399, 62 N. E. 107, and cases there cited; *Wood v. Bibbins, supra*. In view of

the fact that the record shows no application by ap-

8. pellant for a continuance after the amendment was made, and that the evidence is not in the record, there is nothing disclosed by the record from which this court can say that the trial court, in permitting such amendment, abused the discretion lodged in it by the sections of statute, *supra*. This conclusion is supported by the authorities just cited. We find no available error in the record.

Judgment affirmed.

NOTE.—Reported in 102 N. E. 48. See, also, under (1) 2 Cyc. 1013; (3) 11 Cyc. 1140; (4) 17 Cyc. 653; (5) 13 Cyc. 572; (6) 31 Cyc. 358; (7) 31 Cyc. 450; (8) 3 Cyc. 327; 31 Cyc. 450. As to the measure of damages in actions for breach of covenant of warranty of title, see 24 Am. St. 266. As to admissibility of parol evidence to vary writing in respect to the consideration, see 56 Am. St. 664.

KINGAN & COMPANY, LIMITED, v. FOSTER.

[No. 7,989. Filed June 5, 1913.]

1. **TRIAL.—Verdict.—Effect.**—A general verdict for plaintiff is a finding in his favor upon every material averment of the complaint. p. 514.
2. **TRIAL.—Verdict.—Answers to Interrogatories.**—Where the jury's answers to interrogatories are in irreconcilable conflict with the general verdict, beyond the possibility of removal by any evidence properly admissible under the issues, judgment should be rendered on the answers. p. 514.
3. **MASTER AND SERVANT.—Warning Employees.—Duty.**—An employer is generally bound to warn and instruct his employees concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are not discoverable by them in the exercise of ordinary and reasonable care. p. 514.
4. **MASTER AND SERVANT.—Warning Employees.—Youthful Employees.**—The master is bound to give suitable warning and instruction to a minor employe in regard to any danger, whether open or concealed, where such danger is not sufficiently obvious to the intelligence or experience of such employe, in the exercise of ordinary care on his part, measured by the maturity of his faculties and the amount of his experience. p. 515.
5. **MASTER AND SERVANT.—Injuries to Servant.—Verdict.—Answers to Interrogatories.**—In an action by a minor employe for the loss of an eye through the use of muriatic acid in the course of his employment, answers to interrogatories showing that plaintiff, by the diligent use of his faculties, could have known of the danger, when considered with other answers showing that plaintiff had not learned the nature of the acid, nor the dangers attending its use, are not in irreconcilable conflict with a general verdict for plaintiff, which, under the issues, amounted to a finding that no warnings or instructions as to the dangerous character of such acid were ever given plaintiff. pp. 515, 518.
6. **MASTER AND SERVANT.—Injuries to Servant.—Master's Knowledge of Danger.—Presumptions.**—The master in charge of a factory is presumed to know the dangers, latent as well as obvious, arising from the performance of duties imposed upon employees. p. 516.
7. **MASTER AND SERVANT.—Injuries to Servant.—Care to Avoid Injury.—"Diligent".—"Diligent Use of Faculties".**—An interrogatory to the jury asking if plaintiff, by "the diligent use of his faculties", could have discovered the dangerous character of acid

used in connection with his employment, is based upon a higher degree of care than that which the law requires in enjoining the ordinary and reasonable exercise of one's senses, since "diligent" is defined to mean attentive and persistent in doing a thing, steadily applied, active, sedulous, laborious, unremitting, untiring, etc. p. 516.

8. NEGLIGENCE.—*Contributory Negligence*.—One can be said to be guilty of contributory negligence only where he has failed to use ordinary or reasonable care to avoid injury. p. 517.
9. MASTER AND SERVANT.—*Contributory Negligence*.—*Care Required*.—*Youthful Employes*.—A servant in the exercise of the ordinary care required of him to discover dangers of which the master should have warned him, and which are either latent or of such a character as to be unappreciated by him, because of inexperience or youth, is held to only the ordinary use of his faculties or senses. p. 517.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Action by John Foster against Kingan & Company, Limited. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Miller, Shirley, Miller & Thompson, for appellant.

Stephen A. Clinehens and *Clyde P. Miller*, for appellee.

IBACH, J.—In this action appellee recovered judgment against appellant in the sum of \$500 for personal injuries caused by appellant's negligence. The only error presented relates to the court's action in overruling appellant's motion for judgment on the answers to interrogatories returned by the jury, notwithstanding the general verdict. The amended complaint of a single paragraph states that appellee was an ignorant foreign boy who was employed by appellant as a tinner's helper, in which capacity he was required to wipe muriatic acid from that part in a pipe where joints were soldered together, that in so doing some of the acid was brought in contact with his hand, and he not knowing the danger of muriatic acid coming in contact with his eye rubbed his eye with his hand, and the acid coming in contact with his eye completely destroyed the sight thereof. The theory of the complaint is that appellant was under a duty to in-

struct appellee as to the poisonous and dangerous nature of the acid, and the manner in which it might have been used without injury to himself, but that it neglected this duty, and by reason of its negligence in this respect, appellee was injured.

In answering the interrogatories the jury finds specially that plaintiff at the time of his injury was about eighteen years of age, that he had been employed in the work at which he was engaged when injured from June 20, 1906, to July 30, 1906. The following questions and answers are set out verbatim: "7. In wiping joints with muriatic acid, did the plaintiff use a damp or wet rag or piece of cloth of some sort? Yes. 8. Did the plaintiff perform this service several times a day each day while he was in the employment of the defendant? Yes. 9. Was muriatic acid used for the purpose of eating metal with which it came in contact? Yes. 10. Was the action of the acid upon the metal with which it came in contact obvious to one seeing it applied to the metal? Yes. 12. Does muriatic acid discolor the skin when it comes in contact therewith? Yes. 13. Was the plaintiff at the time of his alleged injury in full possession of his faculties and of average intelligence? Yes. 14. Did the plaintiff at said time speak and understand the English language? No. 15. Did the plaintiff at the time of his alleged injury know the nature of the acid with which he was working? No. 16. Could the plaintiff by the diligent use of his faculties have known prior to the time of his alleged injury of the danger of muriatic acid coming in contact with his eyes? Yes. 17. Did the plaintiff learn prior to the time of his alleged injury of the dangers attendant upon the use of muriatic acid? No. 18. Did the acid frequently get on plaintiff's hands while performing his work prior to his alleged injury? Yes. 19. Did the acid when it came in contact with plaintiff's hands cause them to smart at times? Yes. 20. At or about the time plaintiff claims

to have been injured had he been wiping muriatic acid from a joint that had been soldered by the tinner? Yes. 21. Was the plaintiff perspiring at the time of his alleged injury? Yes. 22. Could the plaintiff by the exercise of ordinary care have prevented the acid from coming into contact with his eyes? Yes. 24. Would the accident in question have occurred if the plaintiff had not wiped his face or eye with his hand or cloth in his hand, while there was muriatic acid on his hand or such cloth? No.” It is insisted by appellant that these answers to interrogatories, especially those to Nos. 16, 22 and 24 show that by the use of the degree of care for his own safety demanded of him by law, plaintiff could have known the dangerous character of the acid used by him in his employment of wiping the soldered joints of iron and could have prevented his injury.

The general verdict finds in favor of appellee upon

1. every material averment of the complaint, including the charge that appellant negligently failed to instruct appellee as to the danger attending the use of muriatic acid, and that he was not guilty of any negligence contributing to his injury. If the answers to the interrogatories are in such irreconcilable conflict with the general verdict as to be beyond the possibility of being removed by any evidence properly admissible under the issues, appellant’s motion for judgment in its favor should have been sustained, otherwise there was no error in refusing it.
- 2.

The general rule applicable to this class of cases is

3. thus stated in 4 Thompson, Negligence §4055:

“Generally speaking, an employer is bound to warn and instruct his employes concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are not discoverable by them in the exercise of such ordinary and reasonable care as, in their situation, they may be expected and required to take for their own safety; or con-

cerning such dangers as are not properly appreciated by them, by reason of their lack of experience, their youth, or their general incompetency or ignorance; and unless the servant is so warned or instructed he does not assume the risk of such dangers; but if he receives an injury without fault on his part in consequence of not having received a suitable warning or instruction, the master is bound to indemnify him therefor.” In case of a minor em-

4. ploye, “the master is here, as in every other case, bound to act reasonably and justly; and this rule requires him to give suitable warning and instructions to a minor employe in regard to any danger, whether open or concealed, where the danger is not sufficiently obvious to the intelligence or experience of the employe, in the exercise of ordinary care on his part,—this care being measured by the maturity of his faculties and the amount of his experience.” 4 Thompson, Negligence §4093. Labatt states the rule thus: “The rule actually applied by the courts is merely this: The master is liable for failure to instruct a minor, ‘unless both the danger and the means of avoiding it are apparent and within the comprehension of the servant’.” 3 Labatt, Master and Servant (2d ed.) §1145.

The jury finds by its general verdict that no warnings or instructions of any kind were ever given appellee as to the dangerous character of the fluid he was required to use in his work. It is found by an answer to an interrogatory that plaintiff by the *diligent* use of his *faculties* (our italics) could have known of the danger of muriatic acid coming in contact with his eyes. To properly determine whether the answer to this interrogatory is in irreconcilable conflict with the general verdict, we must consider the general verdict and the facts shown by the answers to the other interrogatories, especially Nos. 15 and 17, which show that he did not know of the nature of the acid, and had not learned of the dangers attending its use. It was said in the case of *Haynes, Spencer & Co. v. Erk* (1893),

6 Ind. App. 333, 336, a case similar to the present, "The fact that appellee might, by the use of his eyesight, have seen that the work was dangerous, or that he, by the use of his reasoning faculties, might have realized and avoided the danger which he was incurring, is not sufficient, under the circumstances, to enable the court to say, as a matter of law, that he was guilty of contributory negligence."

The master in charge of the factory in the present case, by whom appellee was employed, is presumed to have known of the dangers both latent and obvious, which appellee would encounter in the performance of his duties and as to those risks and dangers which were latent or of such a character that by reason of appellee's youth, ignorance or inexperience he was not able to understand or appreciate, he should as far as possible, have been given warning by appellant. Appellee was merely a common laborer in appellant's shop, an inexperienced foreign boy, and it is not reasonable or fair to say that he would be possessed of such knowledge as was necessary to comprehend the extreme danger attendant upon the use of muriatic acid without instruction. The law therefore enjoined upon him while using the dangerous fluid, the exercise of ordinary care to protect himself from the known dangers of his employment, or the dangers which by the exercise of reasonable and ordinary care on his part might have been discovered.

But interrogatory No. 16 is based upon a higher degree of care than this. The word "diligent" is defined to mean attentive and persistent in doing a thing, steadily applied, active, sedulous, laborious, unremitting, untiring, etc. Century Dictionary. So that the expression "diligent use of his faculties" includes a duty to use care beyond the "ordinary or reasonable use of his senses," which is the degree of care enjoined upon him by law. We entertain no doubt, judging from the general verdict and the answers to the remaining interrogatories that the answer to interrogatory No. 16 would have been entirely

different if the question had referred to the exercise of such ordinary care as a reasonably prudent person would have exercised under like conditions and circumstances to discover the danger of muriatic acid coming in contact with his eyes. It is only where a person has failed to use

8. ordinary or reasonable care to avoid an injury that he can be said to be guilty of contributory negligence.

9. In some cases, in the presence of a known danger, as where a traveler is about to cross a railroad, the courts have held that ordinary care under such circumstances demands the diligent use of one's faculties, but a servant in the exercise of the ordinary care demanded of him to discover dangers of which the master should have warned and which are either latent, or of such a character as to be unappreciated by him, because of his inexperience, or youth, is held to only the ordinary use of his faculties and senses. The answers to interrogatories Nos. 22 and 24, can only be understood to mean that the plaintiff could have prevented the acid from coming into contact with his eye, if he had known of the danger from such contact. If he did not know of the danger, he would not be chargeable with contributory negligence for allowing the acid to touch his eyes.

This court in considering a similar question in the case of *Flickner v. Lambert* (1905), 36 Ind. App. 524, 74 N. E. 263, held that when it was apparent that the defendant had failed to instruct the plaintiff as to the manner in which a dangerous machine might be operated with safety, and in answer to an interrogatory the jury found that the plaintiff knew without any warning or instructions, that his hand or fingers would be cut off if he got them in the roller or knives, and in answer to another that he knew or should have known in the exercise of ordinary care, without having his attention drawn to it, or without warning or instruction, that it was dangerous to put his hand near or against the rollers of the machine at which he was working, and another answer showed that with "proper instruction" plain-

tiff could have avoided the injury, the presumption obtains in support of the general verdict that the jury intended to show that the former answer was qualified with the phrase "with proper instructions."

The interpretation which we have placed upon the
5. answers to the interrogatories is entirely justified under the facts of this particular case, and when so interpreted, there is no conflict between the general verdict and the answers upon the question of contributory negligence, and the motion of appellant for judgment on the answers to interrogatories was properly overruled.

Judgment affirmed.

NOTE.—Reported in 102 N. E. 103. See, also, under (1) 38 Cyc. 1869, 1887; (2) 38 Cyc. 1927; (3) 26 Cyc. 1165; (4) 26 Cyc. 1173; (5) 26 Cyc. 1513; 38 Cyc. 1927; (6) 26 Cyc. 1142, 1146; (7) 26 Cyc. 1231; (8) 29 Cyc. 512; (9) 26 Cyc. 1231, 1243. On the general question of the master's duty to warn or instruct servant, see 44 L. R. A. 33. On the master's duty to protect or warn servant against dangers not reasonably to be apprehended, see 21 L. R. A. (N. S.) 89. As to instructing minor servant who is of insufficient age or capacity to comprehend dangers of employment as affecting master's responsibility, see 8 L. R. A. (N. S.) 284. Instructing employes as to obvious dangers not appreciated because of youth and inexperience, see 29 L. R. A. (N. S.) 115. As to the duty of a master to warn and instruct an infant servant, see 3 Ann. Cas. 368, 17 Ann. Cas. 487.

WESTERN INSURANCE COMPANY v. ASHBY.

[No. 8,004. Filed June 5, 1913.]

1. APPEAL.—*Briefs.—Waiver of Errors.*—Where appellant's brief wholly fails to comply with Rule 22 of the Supreme and Appellate Courts requiring a statement of so much of the record as fully presents every error relied upon, such errors will be deemed waived. p. 520.
2. APPEAL.—*Questions Reviewable.—Evidence.—Briefs.*—Although not properly presented by appellant's brief, the court is enabled to consider the questions on the motion for a new trial which relate to the sufficiency of the evidence, and the assignment that the verdict is contrary to law, where a sufficient statement of the evidence is contained in appellee's brief. p. 521.

Western Ins. Co. v. Ashby—53 Ind. App. 518.

3. **INSURANCE.—Fire Insurance.—Condition Avoiding Policy.—Construction.—Waiver.**—A provision in a fire policy that it shall be void upon certain conditions, means that the policy is voidable at the option of the insurer, and unless the insurer, on learning of the conditions, acts with reasonable promptness in notifying the insured of its election to avoid the policy and in restoring or offering to restore the unearned premium, it thereby waives its right to declare the policy void. p. 523.
4. **INSURANCE.—Fire Insurance.—Insurance Brokers.—Knowledge.**—An insurance broker, acting within the scope of his authority, is the agent of the company from which he procures insurance, and his knowledge relating to the risk is binding on the company, though not communicated to it. p. 523.
5. **INSURANCE.—Fire Insurance.—Condition Avoiding Policy.—Waiver.**—An insurance company, having knowledge of facts which would enable it to avoid the policy by requiring proof of loss in the event of a loss, and by failing to give timely notice of its election to avoid, waives the right to defeat recovery by reason of such facts. p. 524.
6. **INSURANCE.—Fire Insurance.—Waiver of Conditions.—Evidence.**—In an action on a fire policy, evidence that the insurance broker knew that plaintiff's title to personal property covered by the policy was not absolute, and that the agents who issued the policy had knowledge of the property and knew that such policy and another covered the same property, and that it was through the oversight of such agents that permission to carry other insurance was not inserted in the policy sued on, warranted the jury in finding that defendant had waived any condition in the policy by which it might have avoided liability. p. 524.
7. **INSURANCE.—Fire Insurance.—Evidence.—Admissibility.**—In an action on a fire policy, testimony of plaintiff showing knowledge of her title by the broker through whom the insurance was placed, was admissible, since knowledge by him of facts relating to the validity of the policy is imputed to the company. p. 524.
8. **APPEAL.—Review.—Judgment.—Presumptions.**—Where no available error is shown, the correctness of the judgment will be presumed. p. 524.

From Allen Circuit Court; *Edward O'Rourke*, Judge.

Action by Leona Ashby against the Western Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Robert B. Dreibelbiss and *H. I. Smith*, for appellant.

Howard L. Townsend and *Elmer Leonard*, for appellee.

FELT, P. J.—This is a suit by the appellee against the appellant to recover upon an insurance policy for the loss by fire of certain personal property. Trial by jury resulted in a verdict for appellee in the sum of \$2,500. From

1. a judgment on the verdict the appellant has appealed, and in its brief states as the first error relied on that the appellee's complaint does not state facts sufficient to constitute a cause of action. Neither the complaint nor the substance thereof is set out in the brief. Furthermore, the only defect suggested in appellant's brief appears to be without foundation for appellee shows that the apparent defect has been cured by the return to a writ of certiorari duly issued on order of this court. Appellant also states in its brief that the court erred in overruling its separate demurrer to the second and fifth paragraphs of appellee's reply to its second, third and fourth paragraphs of answer. But neither the replies nor the demurrers are set out in the briefs, nor is the substance thereof stated. Appellant also claims the court erred in overruling its motion for a new trial. From the briefs we learn that a new trial was asked because the verdict of the jury is not sustained by sufficient evidence, and is contrary to law; that the damages assessed by the jury are excessive; that the court erred in giving to the jury certain instructions and in refusing to give certain instructions tendered by appellant. Also that the court erred in admitting in evidence the testimony of the appellee in which she related a conversation between herself and an insurance broker named Kehoe, who solicited the insurance, delivered the policies and collected the premiums. Appellant has not set out either the instructions given or refused or the substance thereof. Rule 22 is plain and definite and its purpose and scope has been stated in many decisions. Litigants who wholly ignore the rules of the court, cannot expect the court to search the record for errors they have failed to present. In this case appellant has almost wholly ignored the rules and thereby waived the errors, if any, it

desires to have considered. *Chicago Terminal, etc., R. Co. v. Walton* (1905), 165 Ind. 253, 74 N. E. 1090; *Schrader v. Meyer* (1911), 48 Ind. App. 36, 95 N. E. 335; *Webster v. Bligh* (1912), 50 Ind. App. 56, 98 N. E. 73.

Appellee has set out in her briefs much of the evidence given at the trial, which is sufficient to enable us to consider the questions on the motion for a new trial which relate to the sufficiency of the evidence to sustain the verdict, and the assignment that the verdict is contrary to law, also the admissibility of part of appellee's evidence as above shown. The evidence tends to show that appellee was the owner of a large amount of household goods and furniture in the city of Fort Wayne, of the probable value of \$7,000; that on February 10, 1909, she procured two policies of fire insurance, each for \$2,500, one of which was issued by appellant and the other by the Humboldt Insurance Company; that each of said policies was written by Walsh and Kierspe, insurance agents for said companies; that one Kehoe was engaged in the insurance business and solicited appellee to insure her said property, and at the time learned from her that a part of the property owned by her which was to be insured had been purchased by her on the installment plan and that she did not then have an absolute title thereto; that said Kehoe procured the policy in suit from said agents of appellant, delivered the same to her and received from her the premium of \$50 out of which he was paid a commission by said agents; that said Kehoe had for sometime prior to this transaction obtained insurance for appellant through said agents in the same way this insurance was procured; that appellee made no representations as to her title to said property except the statement aforesaid and no further information was sought from her; that appellant was in no way misled or deceived by any statements or representations made by her; that appellant's agents had knowledge of the character of appellee's title to the property insured at the time the policy

was issued; that the policy had been in force almost two years at the time the fire occurred; that shortly after the fire occurred an adjuster of appellant called upon appellee, looked over the property, and was by the appellee fully advised as to the character of her title to the property and he thereafter directed her to protect the property not wholly destroyed by fire and to make an invoice of the property injured and destroyed; that proofs were forwarded to the companies in accordance with such request and later appellant claimed the proof of loss was insufficient and made a request that appellee furnish additional proof, which she did and also made demand for payment; that appellee had nothing to do with the designation or selection of the companies in which her insurance was written and when said Kehoe delivered the policies, she accepted the one in suit and the one issued by the Humboldt Insurance Company for a like amount, and paid him the premiums therefor; that she did not read the policies or know anything about the conditions they contained.

George Kierspe testified that he was one of the agents of appellant in Fort Wayne; that Kehoe brought the insurance to his agency and they paid him the regular commission on the business; that he issued both policies at the same time and was agent for both companies; that both policies were delivered to Kehoe as aforesaid. William Walsh testified that he was the partner of Kierspe and corroborated his testimony. He also stated that he knew what the property was at the time the policies were written and that each of said policies covered the same property; that by an oversight he failed to insert in the policy permission to carry other insurance; but that it ought to have been inserted and it was by his mistake the clause was omitted from the policy in suit. There was no evidence tending to show that the appellant had at any time either before or after the fire, offered to cancel the policy, rescind the contract or return any portion of the premium received.

The policy in suit contains provisions declaring it void if the insured is not the absolute and unconditional owner of the property insured, or if she has or obtains other insurance without the insurer's consent. Appellee does not dispute these propositions, but claims, appellant had knowledge of her title and of the other insurance, and after obtaining such knowledge, issued the policy, collected and retained the premium, and after the loss occurred not only required her to make proof of the loss, but after several weeks of delay, to furnish additional proofs, which she did.

The doctrine is well established in this State that

3. a provision in such policy rendering it void upon certain conditions, means voidable at the option of the insurer, and that to render it void, upon discovery of the facts by which liability may be avoided, it must act with reasonable promptness, must notify the insured of its election to avoid the policy, tender back, or in some appropriate way restore, or offer to restore, the unearned premium received, and upon failure so to do will be deemed to have waived the right to so declare the policy void, and to have elected to treat it as a valid contract of insurance. *Glens Falls Ins. Co. v. Michael* (1907), 167 Ind. 659, 678, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708; *Ohio Farmers Ins. Co. v. Vogel* (1906), 166 Ind. 239, 244, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. 382, 9 Ann. Cas. 91; *Metropolitan Life Ins. Co. v. Johnson* (1912), 49 Ind. App. 233, 94 N. E. 785; *United States, etc., Ins. Co. v. Clark* (1908), 41 Ind. App. 345, 351, 83 N. E. 760.

It has been held in this State that an insurance

4. broker, acting within the scope of his authority, is the agent of the company from which he secures insurance, and that his knowledge relating to the risk is binding on the company, though not communicated to it. *German Fire Ins. Co. v. Greenwald* (1912), 51 Ind. App. 469, 99 N. E. 1011 and cases cited.

Where an insurance company has knowledge of facts

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which would enable it to declare the policy void and a
5. loss occurs, by requiring proof of loss and failing to give timely notice to the insured of its election to avoid the policy, it waives the right to defeat a recovery on the policy by reason of such facts. *Replogle v. American Ins. Co.* (1892), 132 Ind. 360, 367, 31 N. E. 947; *Home Ins. Co. v. Marple* (1891), 1 Ind. App. 411, 413, 27 N. E. 633; *Phoenix Ins. Co. v. Boyer* (1891), 1 Ind. App. 329, 27 N. E. 628.

From the evidence in this case it is clear that the
6. jury was warranted in finding that appellant had waived any condition in the policy by which it might have avoided liability. Where this is done the policy will be enforced the same as if such provisions were not in the policy. *Ohio Farmers Ins. Co. v. Vogel, supra.*

The knowledge of the broker relating to facts
7. affecting the validity of the policy issued by appellant to the appellee being imputed to the company it follows that the court did not err in permitting appellee to testify to facts showing his knowledge of her title before the policy was either written or delivered.

No available error is shown by the briefs. The
8. presumption is in favor of the judgment of the lower court and substantial justice appears to have been done between the parties.

Judgment affirmed.

NOTE.—Reported in 102 N. E. 45. See, also, under (1, 2) 2 Cyc. 1013; (3) 19 Cyc. 791, 798; (4) 19 Cyc. 812; 22 Cyc. 1434; (5) 19 Cyc. 801; (6, 7) 19 Cyc. 953; (8) 3 Cyc. 275. As to knowledge of agent being imputed to insurer, see 9 Am. St. 232. As to when an insurance broker is agent for insured, see 38 L. R. A. (N. S.) 614. As to whether failure of the insurer to speak or act after notice of breach of policy constitutes a waiver thereof, see 25 L. R. A. (N. S.) 1.

DARBY ET AL. v. VINNEDGE.

[No. 7,818. Filed February 13, 1913. Rehearing denied June 5, 1913.]

1. HUSBAND AND WIFE.—*Rights of Wife in Husband's Real Estate.*—The law looks with favor upon the wife's interest in her husband's real estate, as well as upon her marital rights as widow in such real estate. p. 532.
2. MORTGAGES.—*Foreclosure.—Rights of Wife of Mortgagor.*—As against a mortgage in which the wife has joined, she may compel the holder to exhaust the husband's two-thirds before selling her one-third to pay the mortgage debt, and she is entitled to the surplus not exceeding one-third of the value of the whole of the land as against her husband's creditors, and the same rule applies in favor of a widow as to a purchase money mortgage in which she had not joined, where her husband conveyed the real estate encumbered by such mortgage. p. 532.
3. HUSBAND AND WIFE.—*Lands Purchased on Contract.—Rights of Wife.—Enforcement of Vendor's Lien.*—A wife may claim her one-third in lands purchased by the husband on contract, and may compel the holder of the vendor's lien to exhaust the husband's two-thirds before selling her one-third. p. 533.
4. HUSBAND AND WIFE.—*Rights of Wife in Husband's Real Estate.—Tax Liens.*—The widow of a deceased husband or the wife of a judgment debtor, is entitled to have a lien for taxes against the property owned by the husband paid out of the two-thirds of his lands. p. 533.
5. MUNICIPAL CORPORATIONS.—*Street Improvements.—Taxation.*—Street improvement statutes are considered an exercise of the power of taxation. p. 533.
6. HUSBAND AND WIFE.—*Fraudulent Conveyances.—Setting Aside Conveyance.—Rights of Grantor's Wife.—Street Improvement Liens.*—Where a conveyance by husband and wife was set aside as fraudulent as against his creditors, and the real estate was sold at judicial sale to the creditors, subject to the rights of the wife, but prior to the proceedings to set aside such conveyance, the fraudulent grantee had signed a waiver in order to procure the privilege of paying an assessment lien for street improvements in installments, such wife, as against the creditors, could compel the sale of the interest of such creditors and the application of the proceeds to the payment of such lien before resorting to her interest for its payment. pp. 533, 534.
7. FRAUDULENT CONVEYANCES.—*Fraudulent Grantee.—Trusts.*—A fraudulent grantee holds the land, conveyed to him in fraud of the grantor's creditors, in trust for such creditors. p. 534.

Darby v. Vinnedge—53 Ind. App. 525.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action by Fannie C. Vinnedge against Evaline V. Darby and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Bell & Purdum, Gifford & Gifford and *Bell, Kirkpatrick & Voorhis*, for appellants.

Groninger & Groninger, for appellee.

HOTTEL, J.—On August 17, 1909, appellee Fannie C. Vinnedge, filed in the Tipton Circuit Court her complaint in two paragraphs against the appellants, Evaline V. Darby, the Assets Realization Company, John P. Kemp, Michael Bath, as treasurer of the city of Tipton, John F. Barlow, as auditor of Tipton County and Leonard Compton as treasurer of said county. In the second paragraph of her complaint she averred in substance: that she and Samuel J. Vinnedge were then and for more than thirty years prior thereto had been husband and wife; that on April 13, 1897, and for sometime prior thereto her husband was the owner of lot one in block fourteen in the original plat of the city of Tipton; that on said day her said husband, she joining with him, conveyed said lot to Carl Kimball, who, on March 9, 1906, his wife joining with him, conveyed said lot to Lou Cottingham; that afterwards Evaline V. Darby and the Assets Realization Company commenced an action in said court against Samuel J. Vinnedge to recover judgment against him and subject said lot to the payment of such judgment on the ground that each of said conveyances were fraudulent as against the creditors of said Vinnedge, to which action the said Kimball and Cottingham were each made defendants; that on September 26, 1907, the court found and adjudged in said action that there was due Evaline V. Darby \$2,486.86, and that there was due the Assets Realization Company \$3,481.75 from said Samuel J., that said conveyances were each fraudulent and void, that said judgment was a lien on said lot, that said conveyances be set aside

and held for naught, and that said lot should be sold to satisfy the said amount found due each of said defendants, subject to the rights of plaintiff as the wife of said Samuel J.; that pursuant to said judgment and decree said lots were sold on December 14, 1907, to said Evaline V. Darby and the Assets Realization Company, subject to the plaintiff's right as the wife of said Samuel J.; that after a year had expired no one having previously redeemed said lot, the sheriff of said county made a deed therefor to Evaline V. Darby and the Assets Realization Company subject to the plaintiff's right therein as wife of said Samuel J.; that on May 12, 1909, the plaintiff in a partition proceeding filed in said court, procured partition of said lot between her and the said Assets Realization Company and said Darby and there was set off and apportioned to plaintiff 25 feet off of the east end of said lot as her one-third interest therein, since which time she has been the owner of said part of said lot; that at that time the entire lot was encumbered with a street assessment of \$962.52 on account of the improvement of Madison Street in said city made in the year 1906; that said improvement was made payable in 10 equal installments at the option of the owner to the treasurer of said city, as provided by law; that on February 10, 1908, the defendant as treasurer of said city, sold said lot to the defendant, John P. Kemp for \$265.14 on account of installments then due and delinquent on said street assessment; that said sale was made without first offering and exposing for sale the part of said lot owned by the defendants Evaline V. Darby and the Assets Realization Company; that the two-thirds interest of said defendants in said lot was at that time and is of the value of \$3666.66 and if it had been offered separately at said sale would have sold for enough to have paid off and discharged the full amount of the street lien for which the whole of said lot was sold; that there were no other liens or encumbrances on said lot except about \$250 taxes due said county and city; that the value of the entire

lot was \$5,500; that such sale was without right or authority; that the defendants, Evaline V. Darby and the Assets Realization Company and John P. Kemp and each of them are making the illegal and unfounded claim that the plaintiff's said part of said lot set off to her is primarily liable for the payment of the third of said street lien and subject to be sold separately or jointly with the two-thirds owned by said Evaline V. Darby and the Assets Realization Company regardless of plaintiff's right therein or of the value of said two-thirds of said lot; and regardless of the fact that such two-thirds if offered separately would sell for enough to discharge the entire lien of said street improvement on all of said lot; that said defendants Darby and the Assets Realization Company intend to and will cause the defendant treasurer of said county to expose for sale and sell plaintiff's interest in said lot to satisfy the balance of said street lien as the same becomes due unless enjoined and restrained; that the defendants, the auditor of said county and treasurer of said city, threaten to and will execute to John Kemp a deed to plaintiff's interest in said lot unless enjoined; that the said claims of the defendants Kemp, Darby and the Assets Realization Company are unfounded and without right and a cloud on plaintiff's title. Appellee asks that her title in said lot be quieted as against said liens and that the several threatened acts be restrained and enjoined.

The first paragraph differs from the second in that it contained averments showing the existence of a tax lien on said lot when appellee's part was set off to her, and a sale by the county treasurer to satisfy such lien, the claims of the defendants on account of such lien and such sale and that such claims were a cloud upon plaintiff's title. The additional relief appropriate to such averments was asked.

Michael Bath, as treasurer of said city and Barlow as auditor of said county permitted judgment to go against them by default. The appellants, Darby, the Assets Real-

ization Company and Kemp each filed separate and several demurrers to both paragraphs of the complaint. Afterwards Kemp withdrew his demurrer and refused to plead over, and Compton, as treasurer of said county withdrew his former appearance and refused to plead further and judgment was then taken against each of said last-named defendants as on default.

The demurrers of Darby and the Assets Realization Company were each overruled as to each paragraph of complaint and exceptions properly saved. The appellants Darby and the Assets Realization Company then filed their joint and separate answer to that part of the complaint seeking to free appellee's part of said lot from the assessment for the improvement of West Madison Street in the town, now city of Tipton, in which answer they admit the averments of the complaint with references to the conveyances of said lot, and the setting aside of the same as fraudulent; that they, said appellants, acquired their title through such sale, and that appellee holds her title to the part of said lot set off to her as the wife of Samuel J. Vinnedge. The answer then avers in substance that the assessment lien for the improvement of said street was created by said city under the general provisions for the improvement of streets in cities and towns in force in this State in 1905; that during the year 1905 and for more than eight years prior thereto, said lot appeared in the name of Lou Cottingham and stood upon the tax duplicates in said city and county for taxation in said name; that during the time that all the proceedings were being had in connection with said improvement, said lot was in the hands of said Lou Cottingham and all notices in connection with said proceedings were served on her; that the waiver entitling the owner to the privilege of paying such assessment in installments was signed by Lou Cottingham and not by Samuel J. Vinnedge or his wife Fannie C. Vinnedge; that Samuel J. at no time and in no manner be-

came personally liable for or assumed or agreed to pay said assessment; that said assessment was against the entire lot, and was and is an assessment *in rem* and never has been a claim upon which Samuel J. Vinnedge was personally liable. The appellee filed a demurrer to this answer which was sustained by the court. Appellants refused to plead over, withdrew their denial to the complaint and stood on the rulings on said several demurrers.

The court rendered judgment in appellee's favor, finding the material facts set up in each of the paragraphs of complaint to be true and adjudged the sales of appellee's part of said lot for taxes and street improvements unlawful; that such sales be set aside as null and void; that said officers be enjoined from making the respective deeds necessary to complete such sales; that appellee's title to said lot be quieted as against such sales and as against all claims, rights or interests based thereon or on the liens for taxes and improvements on which such sales were made; that said treasurer of said city of Tipton, and the treasurer of said county of Tipton and their successors in office "are each hereby further enjoined and restrained from selling or offering for sale, and said defendants from claiming their right to sell, plaintiff's said interest in said lot, to wit:—twenty-five feet off of the whole east end of said lot 1, in block 14, in the original plat of said city of Tipton, Tipton County, Indiana, heretofore mentioned and described for and on account of said street assessment or any installment or part thereof until the remaining two-thirds part of said lot owned by said defendants Evaline V. Darby and the Assets Realization Company has been offered and exposed for sale and fails to bring enough to pay off and satisfy said assessment or any installment or part thereof sought to be made by such sale."

A motion to modify the judgment made by appellants Darby and said Assets Realization Company was overruled. This motion is lengthy, and as it is conceded that the same

question is presented by the rulings on the demurrers to the second paragraph of complaint and appellants' answer, we will consider the question as presented by such rulings. Appellants say that the question for decision is this: "Upon the sale of a tract of land upon a lien created by the municipal government in the improvement of the street does the entire lot or tract of land pass, or is the wife entitled to one-third of the tract of land freed from the lien for improvement?" We cannot agree that this is an entirely accurate statement of the question presented by the record in this case. The statement, before made, of the facts disclosed by the record shows that Kemp, the purchaser at said sales, and the city and the county treasurers and the county auditor each suffered a judgment to go against them by default, and the only persons assigning error on this appeal are Evaline V. Darby and the Assets Realization Company. It is also disclosed by the averments of the complaint that the sale of the lot for the assessment due on the street improvement was made to Kemp by the treasurer of said city. The complaint shows that this sale was made February 10, 1908. The statute in force at that time provided that the sale should be made by the county treasurer. §8720 Burns 1908, Acts 1905 p. 219, §115. The law was afterwards changed in this respect so that the sale is now made by the city treasurer. Acts 1909 p. 412, §5. For the reasons indicated we are of the opinion that the only question presented by the record in this case is whether as between the appellee and said appellants, the appellee is entitled to have the said appellants' part of said lot first offered for sale to satisfy the lien of the separate installments for said street improvements, before appellee's part is offered for sale for such purpose, and whether appellee is entitled to an injunction enjoining appellants from offering or causing to be offered appellee's part of such lot for sale until after their own part of said lot has been first offered. The appellee's interest in said lot was vested in her by virtue of §3052 Burns 1908,

§2508 R. S. 1881, and the question here involved depends upon the interpretation and construction to be placed upon said section as applied to the facts of this case.

It is earnestly insisted by appellants that the wife's interest in her husband's land, sold at judicial sale, is the same as where the husband has died, and that in such case she takes such one-third interest *free from the demands of creditors*; that a creditor is one who holds a personal debt, demand or obligation against another, and that the assessment for this street improvement was in no sense a debt, demand or obligation against appellee's husband, Samuel J. Vinnedge, but that it was merely a lien against the entire lot on which the assessment was made.

The decisions of the Supreme Court and Appellate Court all seem to recognize that the law looks with favor upon the wife's interest in her husband's real estate as well as

1. upon her marital rights as widow, in such real estate.

Staser v. Garr, Scott & Co. (1907), 168 Ind. 131, 135, 136, 79 N. E. 404; *Green v. Estabrook* (1907), 168 Ind. 123, 129, 79 N. E. 373, 120 Am. St. 349; *Luken v. Fickle* (1908), 42 Ind. App. 445, 460, 84 N. E. 561.

As against a mortgage in which the wife has joined, she may compel the holder of the mortgage to exhaust the husband's two-thirds before selling her one-third to pay

2. such mortgage debt and she is entitled to the surplus not exceeding one-third of the value of the whole of

the land as against his judgment creditors. *Purviance v. Emley* (1891), 126 Ind. 419, 26 N. E. 167; *Union Nat. Bank v. McConaha* (1895), 14 Ind. App. 82, 42 N. E. 495; *Bartmess v. Holliday* (1901), 27 Ind. App. 544, 61 N. E. 750; *Kelley v. Canary* (1891), 129 Ind. 460, 29 N. E. 11; *Staser v. Garr, Scott & Co., supra*; *Green v. Estabrook, supra*; *Luken v. Fickle, supra*. The rule just announced has been held to apply in favor of the widow in the case of a purchase money mortgage in which she had not joined, where the husband conveyed the real estate encumbered by such mort-

- gage. The wife may also claim her one-third in lands
3. purchased on contract and may compel the holder of the vendor's lien to exhaust the husband's two-thirds before selling the wife's one-third. *Overturf v. Martin* (1908), 170 Ind. 308, 84 N. E. 531; *Bowen v. Lingle* (1889), 119 Ind. 560, 20 N. E. 534. It has also been held
 4. that the widow of a deceased husband or the wife of a judgment debtor is entitled to have a lien for taxes against the property owned by the husband paid out of the two-thirds of his lands. *Thompson v. McCorkle* (1894), 136 Ind. 484, 34 N. E. 813, 43 Am. St. 334; 36 N. E. 211; *Haggerty v. Wagner* (1897), 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384. In this connection it may be remarked
 5. that street improvement statutes are considered as an exercise of the power of taxation. *Voris v. Pittsburgh Plate Glass Co.* (1904), 163 Ind. 599, 607, 70 N. E. 249; *State, ex rel. v. Board, etc.* (1908), 170 Ind. 595, 609, 85 N. E. 513.

The policy of the law to favor and even to amplify the rights of the wife or widow in her husband's real estate as evidenced by the decisions cited, should have an important if not controlling influence upon the determination of this question, and we are not prepared to say that this influence alone might not be sufficient to cause us to affirm the judgment of the lower court in this case. We must admit, however, that none of the cases relied on by appellee, and cited herein quite reach the exact question here presented.

All of these cases in which these expressions favoring and possibly amplifying the wife's or widow's rights in her husband's real estate are found, were cases where her

6. rights were being considered as against creditors of the husband, and are not therefore strictly applicable to the question here presented, if appellants be right in their contention that this lien for street improvement was not a debt of appellee's husband but was strictly a lien against and confined to the lot in question. Upon this

branch of the case we have been unable to find any authority directly in point, but we are inclined to the belief that appellants stand in no position to make this claim. The complaint and the appellants' joint answer both show that Lou Cottingham, the grantee of appellee's husband, by her attorneys or agents signed a waiver by which she obtained the privilege of paying the street assessment in question in installments. If she obtained this privilege, given by the law to the holder of the lot, either as the agent of Samuel J. Vinnedge or as the agent of the appellants, their claim that this is not a debt which can be enforced against their two-thirds of the property, rather than against appellee's interest therein, loses its force and merit. It was at the instance of appellants that the deed to and title in Lou Cottingham was set aside as fraudulent. They sought to take, and did take, the lot with the assessment lien thereon and with the benefits of the waiver. It is for the delinquent installments falling due under such waiver that said appellants are asserting their right to sell the property, and it was against the assertion of such a lien on her property that appellee sought to be, and was relieved by the judgment appealed from.

7. Under the authorities, Lou Cottingham as the fraudulent grantee of Samuel J. Vinnedge held the lot in question in trust for the creditors of said Vinnedge, 6. these appellants, Darby and the Assets Realization Company. *Jones v. Reeder* (1864), 22 Ind. 111, 112; *Stout v. Stout* (1881), 77 Ind. 537, 539; *Doherty v. Holli-day* (1894), 137 Ind. 282, 288, 32 N. E. 315, 36 N. E. 907; *Chamberlin v. Jones* (1888), 114 Ind. 458, 461, 16 N. E. 178. If, therefore, under the facts of this case, the law will not permit us to hold that Lou Cottingham acted as the agent of Samuel J. Vinnedge, in signing, or causing to be signed, the waiver whereby the assessment in this case was permitted to be paid by installments, which would make the debt that of said Vinnedge, it is because, as between said Vinnedge and his creditors, these appellants, said Cot-

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tingham must be treated as the agent or trustee of such creditors holding the property for them; and certainly neither law nor equity could justify a court in holding that such creditors may ratify and receive the benefits of the act of such trustee, in the preservation of the property and at the same time deny the liability growing out of the same act.

We find no reversible error in the record and the judgment is affirmed.

NOTE.—Reported in 100 N. E. 862. See, also, under (1) 14 Cyc. 63; (2) 14 Cyc. 68; (4) 14 Cyc. 66; (5) 28 Cyc. 1102; 37 Cyc. 711; (7) 20 Cyc. 680. As to estoppel against married women, see note to *Trimble v. State* (Ind.), 57 Am. St. 169.

ANHEIER ET AL. v. FOWLER ET AL.

[No. 7,632. Filed June 6, 1913.]

1. MUNICIPAL CORPORATIONS.—*Public Improvements.—Remedy of Property Owner.—Time of Suing.—Complaint.*—An action by property owners to set aside and cancel as void a contract for the construction of a sewer, is governed by §8959 Burns 1908, Acts 1905 p. 219, §265, providing that no suit to enjoin the construction of any improvement shall be brought unless brought within ten days from the letting of the contract, so that a complaint disclosing that plaintiffs did not bring themselves within the provisions of the statute is fatally defective. p. 543.
2. MUNICIPAL CORPORATIONS.—*Public Improvements.—Remedy of Property Owners.*—Under §8959 Burns 1908, Acts 1905 p. 219, §265, the right of injunction and appeal, as given by the statute itself, are the only remedies open to property owners who are aggrieved by the action of a city or town board in the matter of public improvements. p. 546.

From White Circuit Court; *James P. Wason*, Judge.

Action by James R. Fowler and others against Anthony A. Anheier and others. From a judgment for plaintiffs, the defendants appeal. *Reversed.*

Palmer & Carr and *William E. Uhl*, for appellants.

Alfred W. Reynolds and *Emory B. Sellers*, for appellees.

SHEA, J.—This action was brought by appellees against

appellant Anthony A. Anheier, the town of Monticello, Indiana, the board of trustees of said town and Archie K. Rawlins, interested as a contractor, to have a contract between Anheier and the town, by its board of trustees, set aside and declared illegal and void, and to cancel and annul same. The complaint was in three paragraphs, demurrers to each of which by appellants separately, were overruled. Appellant Anheier filed a separate answer in two paragraphs, the first a general denial. Appellees' demurrer to the second paragraph was sustained. Each of the other appellants filed separate answers in general denial only, which were afterwards withdrawn. Appellant Anheier then filed an amended second paragraph, and additional paragraphs of answer numbered three to nine, inclusive, to each of which appellees' demurrers were sustained. Appellants declining to plead further, judgment was rendered in favor of appellees, annulling the contract.

The errors assigned are that the White Circuit Court had no jurisdiction of the action, or the subject-matter thereof; that the court erred in overruling appellants' demurrers to each paragraph of the complaint, and in sustaining appellees' demurrers to each paragraph of appellants' answers. The first paragraph of complaint, in substance, alleges that appellees, severally, are the owners of real estate in the town of Monticello, Indiana; that on April 2, 1907, the board of trustees of said town ordered the construction of a main sewer, adapted for the use of owners of property abutting thereon and also for receiving sewage from collateral drains already constructed or to be constructed. As a part of the same proceeding the board ordered the construction of thirteen laterals for local use only, to be constructed with funds from assessments on abutting property, and a resolution was adopted ordering the construction of this improvement; that the town engineer made an estimate of the total cost of same of \$15,000, which he filed with the board of trustees on or before April 2, 1907, the day set for the hearing; that

no objections were made, and the board found that the improvement was necessary; that the district to be drained by the sewer was properly bounded and that the special benefits to the lands within the district would be equal to the estimated cost, fixing May 7, 1907 as the day upon which bids would be received for the construction of the improvement, and ordering the town clerk to give notice by publication. The only notice given was that the board would receive bids on that day for the construction of the sewer, and award the contract, and no notice was given any person whose property was liable to be assessed, to be present for any purpose; that the board met on May 7, 1907, but no bids were received, and thereupon at the same meeting said board secretly, and without the knowledge of the bystanders, ordered the engineer to reestimate the cost of the work, which he did, by writing on the margin of the map of assessable territory: "Total cost reestimated this May 7, 1907 at \$22,000. R. A. Lawrie, Engineer"; that he afterwards filed with the clerk of the town a report that in pursuance with the order of the board, he had made a reestimate of the cost of constructing the sewer of \$22,000; that the board without right or authority of law entered an order of approval of the reestimate, which was filed with the town clerk, and thereupon ordered that he give new notice by publication, fixing May 21, 1907, as the day for receiving bids and letting the contract; that appellees had no notice or knowledge that the original estimate had been raised from \$15,000 to \$22,000 until after May 21, 1907. That the clerk gave notice as ordered by the board, which met on that day and awarded the contract to appellant, Anthony A. Anheier, for the sum of \$21,950, and on June 4, 1907, the contract was put in writing and signed by the board and Anheier; that 760 feet of the main sewer next its outlet which will cost about..... thousand dollars, is entirely without the corporate limits of the town, passing across unplatted farm and pasture land, and prior to the execution of the contract the board had

agreed with the owners of this unplatted land, aggregating about thirty acres, that same should be exempt from assessment on account of the construction of the sewer, and thereby the cost of the 760 feet will be added to the assessment of property owned by appellees and others within the assessable area shown by the map; that neither appellees nor other owners of property within said territory have ever been given notice or opportunity to prove whether the total benefit to property within the assessable territory shown by the map filed in the proceedings, was more or less than the estimated cost of \$22,000; that the reestimate of the cost of construction was without authority of, and contrary to law, and the contract between the board and appellant, Anheier, was \$6,950 above the legal estimate made by the engineer and filed with the clerk; that the part of the assessable area as shown by the map lying west of the Chicago, Indianapolis and Louisville Railway is wholly disconnected and does not abut upon the main sewer or any of the laterals to be constructed under the contract, but must discharge its sewage through the main sewer; that the territory proposed to be assessed lying east of the railway is almost entirely platted and owned by several hundred people some of whom refuse to join in this action, but all of whom are interested the same as appellees, and this action is brought in their behalf as well; that appellant, Rawlins, claims an interest in the contract, and is made a party to this action to answer as to same; that the board of trustees has never passed a resolution or made any finding or order of record that any part of the general funds of the town be appropriated for the payment of any part of the construction of the sewers, so that the entire contract price, if collected, must be borne by the real estate situated in the district shown by the map; that notwithstanding the board found and entered of record on April 2, 1907, that the special benefits accruing to the lands within the district were equal to the estimated cost of the improvement, \$15,000,

they now assert that on May 7, 1907, they found and determined that such benefits are equal to the reëstimated cost but omitted to record this finding, and on September 3, 1907 will enter same *nunc pro tunc* as of date May 7, 1907. Appellees allege that the question of special benefits to abutting property was not considered by the board on that date, nor was any such finding and determination made then or at any time; that the board at a meeting to be held September 3, 1907, will pass and record a resolution that the special benefits to abutting property holders are equal to the reëstimated cost, which shall be final and conclusive upon all parties, and that the board has no right, power or authority at this time, and will not have on September 3, 1907, to pass and record such resolution, nor to change the district included in the map and confine the assessments to be made for the construction of the improvement to abutting property holders, which would be the effect could the board legally pass the proposed resolution; that if the board is permitted to pass the resolution or make the *nunc pro tunc* entry, it would create a cloud upon the title of appellees and others owning property abutting on the improvement. Prayer that the contract entered into by the board and Anheier be set aside and declared void and all illegal records and corrections of records made or threatened to be made, which will affect the title of appellees' land be cancelled and held void, the cloud thus placed upon appellees' several titles removed and each quieted and set at rest, and for all proper relief.

The second paragraph contains all the allegations of the first, and substantially the following additional charges: That in the original resolution for the construction of the improvement, the area to be drained and benefited was described as within certain boundaries. This territory included lands which did not abut either upon the main sewer or any of the branches, and can only be connected with the outlet sewer by future drainage; that the board caused a

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map of the territory within the boundary lines to be made and filed with the clerk, with an estimate of the cost of the sewer on or before March 5, 1907, and on January 1, 1907, contemporaneously with the adoption of the resolution directed Robert A. Lawrie the town engineer to prepare plans and specifications for the sewer and branches as described in the resolution. On January 15, 1907, the engineer filed with the clerk his report, including plans and specifications for the improvement, a map (which is the same used throughout the proceedings) of the territory benefited and an estimate of the total cost of the work. At the same meeting at which his report was filed, the board directed that notice be given by the clerk that on March 5, 1907, objections to the construction of the sewers would be heard. Notice was given, but on that date the board heard no objections, and adjourned until March 12, 1907, at which time no meeting was held, nor did it meet again until March 18, 1907, when it adopted a resolution, the same one which was adopted on January 1, 1907, and fixed April 2, 1907, as the day it would meet and hear all persons whose property might be affected, ordering the clerk to give notice, which was done; that on April 2, 1907, the plans, specifications, map of assessable territory and estimate of the cost of the improvement as reported and filed on January 15, 1907, were adopted; that said plans, specifications and estimate of cost were the same and only ones considered by the board and examined by the property owners on April 2, 1907; that the board found the district to be drained by the sewer provided for in the original resolution, was properly bounded, and that the special benefit to the lots and lands within said district would be equal to the estimated cost of the improvement, \$15,000, and no more, which decision has never been changed, reversed, appealed from nor modified by the board; that appellees were content with the estimate of the cost, and with the finding and decision of the board; that the board never fixed a time and place for any hearing or review

of said decision, nor gave notice in any manner that at any time it would review, reconsider, change or modify such finding, and the same remained unchanged until the date of the letting of the contract, and the board having advertised for bids to be received on May 8, 1907, and receiving none, readvertised, fixing May 21, 1907, as such date, when it awarded the contract to Anheier for \$21,950, which was \$6,950 more than the total special benefits accruing to the lands in the territory bounded by the original resolution; that on July 6, 1907, a written contract was entered into with Anheier by the terms of which the contract price of \$21,950 is to be paid out of the assessments against benefited property, and such bonds as may be issued on account thereof; that the board never provided by resolution or otherwise that any part of the cost of construction of the sewer should be paid out of the general fund of the town, but it is, on the contrary, expressly provided that the costs and expenses shall be assessed against the real estate benefited, and turned over to the contractor, either in original assessments or bonds to cover same; that appellees resided in the town of Monticello, Indiana, and knew the contract was made without authority of law, and provided for the payment of sums of money largely in excess of the total special benefits accruing to the real estate liable to be assessed therefor, which would be unlawfully levied and assessed against appellees' lands, and many thousands of dollars in excess of the special benefits which will accrue to the lots and lands abutting on the sewer and its several branches; that the board ordered the construction of a branch of the sewer through lots belonging to Charles A. Holliday, William E. Biederwolf, and Ida Biederwolf at a place where there is no street or alley, and without condemnation proceedings, and that the board and other appellants have no right, power or authority to enter upon these private grounds to construct the branch, which will result in laying tile without an outlet therefor; that this will be useless and

result in an outlay of money with no resultant benefits, for a part of which appellees' real estate lying within said territory will be unlawfully assessed; that the board of trustees, knowing the facts herein alleged, purposely and fraudulently accepted the bid of the contractor Anheier, and executed the contract in order that Anheier might obtain a profit on the work done and materials furnished under the contract, and intends to assess the expense of establishing the improvement and cost of superintending the work and the contract price against the real estate included in the area described in the original resolution, including appellees' lots and lands, and thus create a cloud upon their titles. A copy of the contract is made a part of this paragraph of the complaint by exhibit.

The third paragraph of complaint repeats the allegations of the second with this difference as to certain described land outside the town boundary belonging to William H. Robinson and Samuel E. Roth, mentioned in the second paragraph, through which the main sewer passes a distance of about 760 feet to its outlet. Instead of the charge that the board of trustees obtained the right to put the sewer through these lands by an agreement with the owners that their lands should be exempt from assessment on account of the improvement, it is, in substance, alleged that the order for the construction of the sewer was made and the contract for the work let and executed by the board of trustees without having acquired the right to construct the sewer or to maintain the same, by condemnation proceedings or in any other manner, through any of said grounds; that besides the lots of William E. and Ida C. Biederwolf and Charles A. Holliday mentioned in the second paragraph of complaint, this paragraph charges substantially that the sewer passes through other private grounds where there is no street or alley, namely, certain described land belonging to William Keever and an outlot belonging to John Teeter, and that said board made the order for the construction of the sewer

and executed the contract without having acquired any right, by condemnation proceedings or otherwise, to construct the sewer through any of said private grounds, and this right had not been acquired in any manner up to the time of bringing this action; that no one had any right or authority to enter upon the grounds to construct said work, could not do so, and consequently the order of construction and the contract were void and of no effect. The relief asked in this paragraph is substantially the same as that asked in the first.

It is the opinion of this court that §8959 Burns 1908, Acts 1905 p. 219, §265, governed this proceeding. It expressly provides, "That no suit to enjoin the construction

1. of any improvement shall be brought by any property owner unless brought within ten days from the letting of such contract." This section and this particular portion of the act has received the sanction of the Supreme Court of this State in the case of *Martindale v. Town of Rochester* (1908), 171 Ind. 250, 86 N. E. 321. The complaint discloses that appellees did not bring themselves within the provisions of said act. They now seek to accomplish indirectly what they should have done directly. The act itself governs and controls all the conduct of the town board, and the aggrieved taxpayers should have taken advantage thereof. Any other construction of the act would tend to endless confusion and hopeless litigation.

The case of *Martindale v. Town of Rochester, supra*, is an exhaustive case with much citation of authority, and goes into a discussion of the important questions in this case. The court in passing upon §8959 Burns 1908, uses the following language: "Besides, it will be observed that all the grounds or reasons set out in this opinion, which appellant claims show that the proceeding and contract for said improvement were void, relate to matters before or at the time of the letting of the contract. It is expressly provided in §8959, *supra*, 'that no suit to enjoin the construction of any

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improvement shall be brought by any property owner unless brought within ten days from the letting of such contract.' The object of said statute is evident and its effect just, for it requires the property owner who desires to question the validity of the contract to commence his suit therefor 'within ten days from the letting of the contract,' that is, before any substantial part of the improvement is made. If the property owner does not commence such suit within the ten days mentioned, he cannot, after the improvement is completed, maintain a suit to enjoin the making or collecting of benefits for any ground existing prior to the expiration of said ten days. So construed, this statute gives effect to a well-settled principle of equity, for it precludes a property owner, who permits a contractor to improve a street, from defeating a recovery for the work because of errors or irregularities which occurred before the time the contract was executed. *Taber v. Ferguson* (1887), 109 Ind. 227, 231, [9 N. E. 723], and cases cited; *Barber Asphalt Pav. Co. v. Edgerton* [(1890), 125 Ind. 455, 25 N. E. 436], *supra*, and cases cited; *McEneney v. Town of Sullivan* [(1890), 125 Ind. 407, 25 N. E. 540], *supra*; *McCoy v. Able* (1892), 131 Ind. 417, 422-426 [30 N. E. 528, 31 N. E. 453], and cases cited; *DePauw Plate Glass Co. v. City of Alexandria* (1899), 152 Ind. 443, 451, 452 [52 N. E. 608]; *Board, etc. v. Plotner* (1897), 149 Ind. 116, 119, 121, [48 N. E. 635] and cases cited. It was said in the case last cited: 'It is a general rule, now fully accepted in this State, that where the owner of property subject to assessment for public improvements stands by and makes no objection to such improvements which benefit his property, he may not deny the authority by which the improvements are made, nor defeat the assessment made against his property for the benefits derived. And this is true, both where the proceedings for the improvement are attacked for irregularity, and where their validity is denied, but color of law exists for the proceedings. *Palmer v. Stumph* (1868), 29 Ind. 329; *Hellenkamp*

v. *City of Lafayette* (1868), 30 Ind. 192; *City of Evansville v. Pfisterer* (1870), 34 Ind. 36, 7 Am. Rep. 214; *City of Lafayette v. Fowler* (1870), 34 Ind. 140; *Muncey v. Joest* (1881), 74 Ind. 409; *City of Logansport v. Uhl* (1885), 99 Ind. 531, 50 Am. Rep. 109; *Peters v. Griffie* (1886), 108 Ind. 121 [8 N. E. 725]; *Taber v. Ferguson* (1887), 109 Ind. 227 [9 N. E. 723]; *Ross v. Stackhouse* (1888), 114 Ind. 200 [16 N. E. 501]; *Prezinger v. Harness* (1888), 114 Ind. 491 [16 N. E. 495]; *Western Pav., etc., Co. v. Citizens St. R. Co.* (1891), 128 Ind. 525 [26 N. E. 188, 28 N. E. 88], 10 L. R. A. 770, 25 Am. St. 462; *McCoy v. Able* (1892), 131 Ind. 417 [30 N. E. 528, 31 N. E. 453]; *Vickery v. Board, etc.* (1893), 134 Ind. 554 [32 N. E. 880]; *Cluggish v. Koons* (1896), 15 Ind. App. 599 [43 N. E. 158]. In *Vickery v. Board, etc.*, *supra*, the proceedings were attacked upon the ground that the law under which they were had was unconstitutional, and this court held that one who receives the benefits under an unconstitutional law cannot deny the constitutionality of such law. In *Cluggish v. Koons*, *supra*, it was held that the proceeding under a law which had been repealed may not be attacked, as invalid, by one who has stood by and permitted his property to be benefited by such proceeding. In *McCoy v. Able*, *supra*, it was said: "Principle and authority forbid that property owners should be allowed to stand by, inactive and passive, until after the work has been done, and then come in and take from the contractor the value of his work and materials without compensation. For such persons the law has no very tender regard." In *Ross v. Stackhouse*, *supra*, it was said that "in every event, one who acquiesces, with knowledge, until after the improvement has been completed, cannot escape payment for the actual benefits received, even though the proceedings turn out to be void, provided the contractor proceeds in good faith and without notice from the property owner. He cannot enjoy the benefits and escape the burden, unless he interferes or gives notice before the benefit is received." In *Prezinger*

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v. *Harness, supra*, it was said: "The authorities fully justify the statement that, where an improvement is made under color of statutory proceedings, unless such proceedings are so totally and palpably void as that the person who made the improvement or performed the work must have proceeded with a degree of recklessness that amounted to bad faith, the property owner who stood by and received the benefits assessed against his property will be estopped to assert the invalidity of the proceedings without first paying, or offering to pay, the benefits." " " "

Appellees, in this case, without bringing themselves within the terms of the statute, question the validity of the contract. If the contention of appellees in this case is

2. permitted to prevail, the effect of it will be that one whose property is affected by a public improvement, may stand by until he receives the benefit thereof, and after the contractor and all public officials and other property owners have expended large sums of money, may invoke the jurisdiction of the circuit or superior court in an effort to set aside the action of the governing tribunal of the city or town. The fact that original jurisdiction is lodged with city and town boards, together with the fact that the right of injunction and appeal from the board's action is given by the act itself, goes far to convince us that these were the only remedies intended by the legislature. §8959 Burns 1908, *supra*; *Randolph v. City of Indianapolis* (1909), 172 Ind. 510, 88 N. E. 949; *City of Indianapolis v. State, ex rel.* (1909), 172 Ind. 472, 88 N. E. 687.

In the case of *Everett v. Deal* (1897), 148 Ind. 90, 47 N. E. 219, the court uses this language: "The contract was let April 13, 1896; and this action to enjoin the work was not brought until June 8, 1896, and after the work was begun. It was said in *Alley v. City of Lebanon* [1896], 146 Ind. 125, [44 N. E. 1003] citing *Robinson v. City of Valparaiso* [1894], 136 Ind. 616, [36 N. E. 644] also, sections 4288-4299 Burns R. S. 1894 (Acts 1889 p. 237; Acts 1891 p.

323), that an injunction might, in proper case, be had 'upon the proceedings prior to the making of any such [street or sewer] improvements;' but that 'from the time that work begins under a lawful contract, vested rights attach; and the faithful completion of the work is placed by the law in custody of the city authorities, chosen by the people and clothed with power to care for the common welfare.' ''

Many other questions are discussed, including the alleged errors on the sustaining of the demurrers to eight paragraphs of answer, but in view of the conclusion reached by the court it is unnecessary to pass upon them. It may be suggested that appellees were not parties to the original contract. Their interest in the matter is incident to their property being assessed with benefits. We suggest without deciding that they have not such an interest in the original contract as entitles them to have the whole contract declared void. Their remedy would be an appeal or a suit by injunction as provided by the terms of the statute as above set out.

Judgment reversed with instructions to sustain appellants' demurrers to each paragraph of the complaint.

NOTE.—Reported in 102 N. E. 108. See, also, under (1) 28 Cyc. 1021; (2) 28 Cyc. 1017, 1018, 1096. As to the right of a taxpayer, in absence of statute, to enjoin unlawful expenditures by municipality on highway, see 36 L. R. A. (N. S.) 23.

VAPINSKI ET AL. v. TOSETTI ET AL.

[No. 8,021. Filed June 6, 1913.]

1. JUDGMENT.—*Default.—Setting Aside Default.—Sufficiency of Showing.*—An affidavit in support of a motion to set aside a judgment taken by default, showing that affiant desired to resist the action in which the judgment was taken, that he employed a competent attorney for that purpose, and that he believed such attorney would prepare his defense in due time, but that, without affiant's knowledge, such attorney failed to appear in the action, in consequence of which such judgment was taken, wholly fails to disclose such mistake, inadvertence, surprise or excusable neglect as to entitle defendant to relief under §405 Burns 1908, §396 R. S. 1881. p. 548.

2. JUDGMENT.—*Default.—Excusable Neglect.—Negligence of Attorney.*—The negligence of an attorney is the negligence of the client, and a default suffered through the attorney's neglect will not be set aside, unless facts are stated showing such neglect to be excusable. p. 549.
3. JUDGMENT.—*Motion to Set Aside Default.—Affidavits.—Theory.*—One seeking to set aside a default, must proceed on some definite theory and must stand or fall on the facts stated in the affidavit upon which the motion is based, so that facts stated in subsequent affidavits which do not support the facts stated in the original affidavit cannot be considered. p. 549.

From Lake Superior Court; *John A. Gavit*, Judge.

Motion by Paul Vapinski and another to set aside a judgment taken against them by default in favor of Ernst Tosetti and others. From a judgment overruling the motion, this appeal is prosecuted. *Affirmed.*

James W. Brissey, for appellants.

Reilly & Hardy, for appellees.

LAIRY, J.—This appeal is taken from a judgment refusing to set aside a default and open up a judgment rendered by the court in favor of appellees and against appellants on April 28, 1909. Appellant, Paul Vapinski, August 1, 1910, filed his motion supported by affidavits by which he sought to be relieved from such judgment upon the ground that the default was taken and the judgment rendered against him through his mistake, inadvertence and excusable neglect. The proceeding is based upon §405 Burns 1908, §396 R. S. 1881.

Appellants wholly fail to disclose such a case of

1. mistake, inadvertence, surprise or excusable neglect as will entitle them to relief under the provisions of the statute to which we have referred. The portion of his affidavit which relates to this subject is as follows: "That after said suit was filed in the above cause this affiant desired to resist the same, and in conformity to such desire did employ and pay a retainer fee to T. M. C. Hembroff, who was a first class attorney and in good standing at this bar;

that it was the intention and desire of this affiant that this action should be resisted, and all due preparations made to combat the same. That affiant fully believed that his attorney would prepare his defense in due time, but he did not do so, and failed to enter his appearance in such case, all without the knowledge of this affiant, and, that thereafter to wit: on April 25, 1909, judgment by default was taken against this plaintiff and his said wife, and in the sum of \$2340.90, by plaintiff in said cause.”

The courts of this State have held repeatedly that

2. the negligence of the attorney is the negligence of the client, and that a default suffered through the neglect of an attorney will not be set aside, unless facts are stated which show such neglect to be excusable. *Carr v. First National Bank* (1905), 35 Ind. App. 216, 73 N. E. 947, 111 Am. St. 159; *Moore v. Horner* (1896), 146 Ind. 287, 45 N.

E. 341, and cases there cited. Subsequent to the

3. filing of his motion and affidavit, appellants filed two additional affidavits in support of their motion. The facts stated in these affidavits do not support the facts stated in the affidavit of appellants upon which the motion to set aside the judgment is based. The facts stated in these affidavits cannot be considered. Appellants must proceed upon some definite theory, and they must stand or fall on the facts stated in the affidavit upon which the motion is based.

The judgment of the trial court is correct and the judgment is affirmed.

NOTE.—Reported in 102 N. E. 51. See, also, under (1) 23 Cyc. 930, 939; (2) 23 Cyc. 930; (3) 23 Cyc. 954. As to negligence of attorney as ground for vacating judgment, see 80 Am. St. 264; 96 Am. St. 108.

JONES v. BRYAN ET AL.

[No. 7,992. Filed June 17, 1913.]

1. **APPEAL.—Waiver of Error.—Briefs.**—An assignment that the court erred in overruling a motion to strike out certain parts of an answer is waived by appellant's failure to set out the motion in his brief. p. 551.
2. **APPEAL.—Review.—Harmless Error.—Motion to Strike Out.**—Overruling a motion to strike out certain parts of an answer, even if error, is not cause for reversal. p. 551.
3. **APPEAL.—Briefs.—Defects Cured by Briefs of Appellee.**—Appellant's failure to incorporate his motion for a new trial in his brief may be cured by the brief of appellee. p. 551.
4. **NEW TRIAL.—Grounds.**—A new trial may be granted only upon the grounds permitted by statute. p. 551.
5. **APPEAL.—Waiver of Error.—Ruling on Demurrer.**—Error in overruling a demurrer to a paragraph of answer is waived by appellant's failure to set out such answer or its substance in his brief. p. 552.
6. **USURY.—Answer.—Sufficiency.**—In an action on a note and to foreclose a chattel mortgage, an answer showing that the property covered by the mortgage belonged to defendant, although she had made affidavit that it was her husband's property to enable him to procure the loan secured by the mortgage, and that the several payments made by the husband from time to time, and after his death by the defendant, exceeded the amount of the loan and the legal rate of interest to the time of the trial, is not objectionable on the ground that, being an attempt to recoup usurious interest paid by defendant's deceased husband, it does not directly aver that defendant was the heir or personal representative of the husband, or that she was in privity with him. p. 552.
7. **USURY.—Recoupment.**—The right given a debtor by §7953 Burns 1908, §5201 R. S. 1881, to recoup all interest paid in excess of the legal rate, also exists at common law. p. 553.
8. **USURY.—Defenses.—Who May Make.**—The defense of usury may not be set up by a stranger, but is personal to the debtor or borrower and his privies by law, blood, contract, or estate. p. 553.
9. **USURY.—Defenses.—Persons in Privity.**—A wife who permitted her husband to execute a mortgage upon her piano to secure his debt, and, after his death, was obliged to assume the debt to save her piano, was not a stranger to the original transaction, nor a mere volunteer, but had an interest therein entitling her to plead the defense of usury. p. 553.

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10. **USURY.—Defenses.—Who May Plead.**—Under the statute giving a widow a portion of her deceased husband's estate, she becomes a privy with him so that she is enabled to avail herself of the defense of usury against his debts. p. 554.

From Henry Circuit Court; *Ed Jackson*, Judge.

Action by Lamont E. Jones against Martha Bryan and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Kittinger & Diven and *Barnard & Brown*, for appellant.
J. E. Beeler and *Ellis & Ellison*, for appellees.

IBACH, J.—This was an action brought by appellant on a note executed by appellee, Martha Bryan, and to foreclose a chattel mortgage on a piano. Trial by the court resulted in a judgment for appellee for costs.

It is assigned as error that the court erred in refus-

1. ing to sustain appellant's motion to strike out certain portions of appellee's answer. Under the rules of this court this error has been waived by failure to set out such motion and the ruling thereon in appellant's
2. brief, but even if the court did err in its action on such motion, it would not constitute reversible error.

Crawford v. Anderson (1891), 129 Ind. 117, 28 N. E. 314;
Rowe v. Major (1883), 92 Ind. 206.

It is also urged that the court erred in overruling

3. appellant's motion for new trial. Appellant's failure to incorporate this motion in his brief has been supplied by appellee. This motion was upon the grounds that the judgment of the court is contrary to law, that the judgment of the court is contrary to the evidence, and that the judgment of the court is not sustained by sufficient evidence.

A new trial may be granted only upon the grounds

4. permitted by statute. The statute, §585 Burns 1908, §559 R. S. 1881, does not permit the granting of a new trial upon the grounds assigned by appellant. Under the following authorities we are constrained to hold that appellant's motion did not challenge the correctness of the

court's finding or decision, and therefore presented no question to the trial court, and was correctly overruled. *Rosenzweig v. Frazer* (1882), 82 Ind. 342; *Rodefer v. Fletcher* (1883), 89 Ind. 563; *Felt v. East Chicago Iron, etc., Co.* (1901), 27 Ind. App. 494, 61 N. E. 744; *Weaver v. Apple* (1897), 147 Ind. 304, 306, 46 N. E. 642.

Error is also assigned in overruling the demurrer

5. to the fourth paragraph of appellee Martha Bryan's answer. By a strict construction of the rules of this court appellant has also waived consideration of this error, for he has not set out in his brief either the answer sought to be tested, or a sufficient statement of its substance. How-

ever, we think the answer was good. The answer

6. shows that the piano was the property of Martha Bryan and that she made an affidavit that it was the property of her husband in order to enable him to borrow money with it as security. The husband made several payments upon various notes, but died owing, as appellant claimed, \$74. Shortly after his death, in order to prevent her piano being taken to satisfy the mortgage, appellee executed a new note for \$84, the balance on the old loan, and a new loan of \$10. On this she paid \$49, then ten months later gave a note for \$71, the balance claimed by appellant to be due on the old note, and a new loan of \$25. She avers an offer to pay \$25 to appellant in full satisfaction of his claim, and a bringing of that sum into court for his own use. The payments made by appellee's deceased husband, and those made by appellee total more than the amount of the several loans and the legal rate of interest to the time of the trial.

Appellant claims that this answer is bad because it seeks to recoup usurious interest paid by appellee's deceased husband to appellant, and it is not directly averred that appellee was the heir or personal representative of her husband, only that she was his wife. So appellant urges that it does not appear that she was privy with him, and thus

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entitled to recoup usurious interest paid by him, but that she occupies the position of a mere volunteer who assumed the debt, and therefore is not entitled to recoup the usurious interest paid by her husband. By statute (§7953 Burns 1908, §5201 R. S. 1881), a contract to pay usurious

7. interest is void as to the excess over the legal rate of interest, and in an action on a contract affected with usury, the excess over the legal rate may be recouped by the debtor. This same right exists at common law. *Baum v. Thoms* (1898), 150 Ind. 378, 50 N. E. 357, 65 Am. St.

368, and cases cited. The rule is that the defense of

8. usury is personal to the debtor or borrower and his privies by law, blood, contract, or estate, and that it may not be set up by a stranger. Webb, Usury §§365, 366; *Studabaker v. Marquardt* (1876), 55 Ind. 341; *Lemmon v. Whitman* (1881), 75 Ind. 318, 39 Am. Rep. 150.

In our opinion, the fourth paragraph of answer

9. shows that Martha Bryan was such a privy to the debt contracted by her husband that she might set up the defense of usury. It was said in the case of *Faison v. Grandy* (1901), 128 N. C. 438, 38 S. E. 897, 83 Am. St. 693: "It is a well established rule that the defense of usury is personal to the debtor or borrower and his privies by law or contract. Webb, Usury §365; *Davis v. Garr* [1851], 6 N. Y. 124, 55 Am. Dec. 398. And it is true that it is a personal defense, and the right of affirmative relief is likewise personal; but it is personal in the sense that it is to the exclusion of strangers, or parties disconnected with the immediate transaction. It is limited to the borrower or debtor upon whom the burden falls whether he be the *maker* of the note (the evidence of the debt) or not, or otherwise has an interest in the transaction which can be injuriously affected by the usury." In that case Frank Faison, the original debtor, whose debt was secured by mortgages upon lands, had shifted the legal title to the land, accompanied with the debt, to his brother John Faison,

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who gave his own note secured by the land, an arrangement being made that upon payment of the debt, the land should be reconveyed to the original debtor Frank Faison. In an action upon the note and mortgage, Frank Faison interposed the plea of usury, and the court held that although John Faison was the maker of the note, Frank Faison, being the substantial debtor on whom the burden fell, might plead the defense of usury. So in the case at bar, appellee mortgaged her piano to secure her husband's debt, and being the one upon whom the burden of the debt fell, she had such an interest in the transaction that she might plead the defense of usury, and she was not a stranger to the original transaction, nor a mere volunteer. Our holding is also supported generally by the following cases: *Coulter v. Robertson* (1850), 22 Miss. 18; *Merwin v. Romanelli* (1910), 141 App. Div. 711, 126 N. Y. Supp. 549; *Botsford v. Sanford* (1817), 2 Conn. 276; *Hazard v. Smith* (1849), 21 Vt. 123; *Lyon v. Welsh* (1866), 20 Iowa 578.

Further, the rule is that any one in privity of
10. estate or contract with the original debtor may plead usury. By our statute the wife takes a portion of her deceased husband's estate, and thus becomes privy with him so that she is permitted to avail herself of the defense of usury against his debts.

No error having been shown, the judgment is affirmed.

NOTE.—Reported in 102 N. E. 153. See, also, under (1, 5) 2 Cyc. 1014; (2) 31 Cyc. 669; (3) 2 Cyc. 1013 Anno.; (4) 29 Cyc. 759; (6) 39 Cyc. 1041, 1084; (7) 39 Cyc. 1020; (8) 39 Cyc. 999; (9, 10) 39 Cyc. 1064. As to waiver of right of appeal, see 13 Am. Dec. 546. As to what usury is and when it is available as a cause of action or defense, see 55 Am. Dec. 392. As to who besides the principal debtor may urge the defense of usury, see 28 Am. Rep. 491.

THE DELAWARE AND MADISON COUNTIES TELEPHONE COMPANY v. FLEMING.

[No. 8,003. Filed June 17, 1913.]

1. **NEGLIGENCE.—Proximate Cause.—Complaint.**—A complaint against a telephone company on the theory of negligence in the maintenance of a certain guy wire, extending from one of defendant's poles to an anchor in the ground at a point immediately within the curb line of a certain street and alleging that plaintiff's horse, which became frightened and unmanageable by reason of escaping steam on the opposite side of the highway, ran and jumped across said wire and became entangled therewith and was thereby injured, is not objectionable on the theory that it shows that the escape of the steam was an independent proximate cause of the injury, and that the presence of the wire was only a condition and not the proximate cause. p. 559.
2. **NEGLIGENCE.—Injury to Property.—Contributory Negligence.—Complaint.—Burden of Proof.**—In an action for damages for injury to personal property, the plaintiff must allege and prove that he was free from any negligence contributing to such injury. p. 559.
3. **NEGLIGENCE.—Injury to Property.—Contributory Negligence.—Complaint.—Sufficiency.**—A complaint for injury to plaintiff's horse, alleging that plaintiff was exercising reasonable and ordinary care in its management and control, and that he was at all times free of negligence or fault that in any way contributed to the injury of said horse, sufficiently avers plaintiff's freedom from contributory negligence, in the absence of specific averments negating the effect of such general allegation. p. 559.
4. **NEGLIGENCE.—Jury Question.**—Ordinarily negligence is a question of fact, but where the facts are undisputed and admit of but one inference, the question is one of law for the court. p. 561.
5. **TELEGRAPHS AND TELEPHONES.—Construction.—Negligence.—Evidence.**—In an action against a telephone company for injury to plaintiff's horse alleged to have been caused by coming in contact with a guy wire erected and maintained within the sidewalk line, where the undisputed evidence showed the size and presence of such wire and the manner and method of placing and maintaining same, and that the method of maintaining such wire was the usual and customary method and proper in all respects except in the matter of the projecting end, all of which was undisputed, and it was conceded by plaintiff that a guy wire was necessary, and it is in no way shown that such projecting end had anything

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to do with the injury, the question of defendant's negligence was not a question of fact, but one of law for the court. p. 561.

6. **TELEGRAPHS AND TELEPHONES.—Use of Streets.**—The occupancy of the streets of a city by a telephone system is a proper street use, expressly recognized by §8696 Burns 1908, Acts 1905 p. 219, §93, but such use must not obstruct or unnecessarily interfere with the primary use of the streets for the passage of people and vehicles. p. 563.
7. **MUNICIPAL CORPORATIONS.—Use of Streets.**—It is within the discretion of the municipality to determine what part of the nominal highway shall be devoted to the various purposes of passage. p. 564.
8. **TELEGRAPHS AND TELEPHONES.—Use of Streets.—Negligence.**—In an action against a telephone company for injury to plaintiff's horse by coming in contact with a guy wire, where the evidence showed that the wire was within the sidewalk line and not an obstruction to that part of the street used for the passage of horses and vehicles, the fact that the end of such wire, where it was attached to the ground anchor, projected one and one-half inches at right angles from the wire, does not constitute negligence rendering defendant liable for the injuries complained of, where it is not shown that the projecting end had anything to do with such injuries. p. 564.

From Madison Circuit Court; *Charles K. Bagot*, Judge.

Action by James Fleming against The Delaware and Madison Counties Telephone Company. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Marcellus A. Chipman and *Edgar E. Hendee*, for appellant.

Henry C. Ryan, for appellee.

HOTTEL, P. J.—This is an appeal from a judgment for \$150 recovered by appellee in an action for damages on account of injuries to his horse alleged to have been caused by appellant's negligence. The complaint is in one paragraph. A demurrer thereto was overruled, after which appellant filed an answer in denial. There was a trial by the court, and finding for appellee. A motion for new trial was overruled. This ruling and the ruling on said demurrer are each assigned as error and relied on for reversal. The allegations of the complaint necessary to a

presentation of the objections urged against it are in substance as follows: The appellant is a corporation and owns and operates telephone lines. By virtue of an ordinance and agreement with the city of Elwood, Indiana, it, for more than five years last past, operated its telephone system within the limits of such city and for such purpose had poles set along the streets thereof to which it attached and suspended wires and cables for use in the transmission of telephone messages to its patrons. During said time it maintained one of its poles on the inside of the curb on Twenty-second street, at a point where the alley intersects said street. About five years ago appellant carelessly and negligently attached a strong steel wire, one-fourth of an inch in diameter, to said pole about twenty-eight feet above the ground and extended said wire down to within about eighteen inches of the ground and parallel with the curb of said street and attached it to an iron guy rod one inch in diameter, which rod was securely anchored to a permanent fixture buried in the earth at a point immediately inside of the curb on said street, fifty-five feet from the bottom of the pole to which such wire was attached. Such guy rod extended out of the ground about eighteen inches and on the outer end of it there was a loop through which the end of said wire was drawn and bent back towards said pole to which it is attached, and then wrapped back on itself for several inches back from the end of said guy rod. Such connection of the guy rod with the guy wire was about eighteen inches from where said guy rod entered the ground and about two and one-half feet above the ground. In making the connection and splice of said wire and guy rod it was so made that it left the end of the wire projecting about one and one-half inches at right angles to the guy wire. Appellant has maintained said guy rod and guy wire in such condition continuously for the last five years. Said guy wire is drawn tightly from said pole to its attachment in the ground and its office and use is to support and sustain

said pole to which it is attached and prevent the heavy telephone wires attached thereto and extending in the opposite direction from causing such pole to sag. The construction and maintenance of the guy wire as aforesaid was and is a danger and a menace to the safety of persons and horses traveling along said street adjacent thereto, especially to horses that might become excited and frightened and run upon or against it and become entangled therewith. Said wire was unprotected and was not covered in any way to prevent persons or horses from running on or against it, and was so small that it would not attract the attention of a horse approaching it, especially if it were excited and frightened. Said wire extends from the top of the pole to which it is attached to its anchorage in the earth parallel to said curb and the roadway of said street, and is eighteen inches inside of the curb its entire length. On the — day of March, 1910, appellee was and still is the owner of a valuable horse worth \$250, and ordinarily gentle and tractable, which he was leading along and over said street, with reasonable and ordinary care, when he came opposite said guy wire so negligently and carelessly constructed and maintained as aforesaid, when said horse became excited and frightened at some steam escaping from an engine in a machine shop situated on the opposite side of said street from said guy wire and in its excitement and fear of said steam said horse shied and became unmanageable, and ran and jumped across said wire and became entangled therewith, and said wire so mangled, cut and tore said horse's legs and the flesh thereon that it was ruined and became utterly worthless. Appellee was exercising all reasonable and ordinary care in the management and control of said horse and was at all times, free of negligence or fault that in any way contributed to the injury of said horse.

There are also averments charging the city of Elwood with knowledge of the existence of said wire and its condition, but a demurrer by the city was sustained and appellee

refused to plead further and permitted judgment to go against him in its favor. The city is not made a party to the appeal, and its connection with the case need not be further noticed.

It is urged against the complaint that its averments show that the escape of the steam which frightened the horse and caused him to jump across the wire was an independent proximate cause of his injury, and that the presence of appellant's wire was only a condition and not a proximate cause. Among the cases relied on to support this contention appellant cites and quotes from the case of *P. H. & F. M. Roots Co. v. Meeker* (1905), 165 Ind. 132, 73 N. E. 253. This case has been overruled, on the point here involved, and both reason and authority are against appellant's contention. *King v. Inland Steel Co.* (1912), 177 Ind. 201, 96 N. E. 337, 97 N. E. 529; *Balzar v. Waring* (1911), 176 Ind. 585, 95 N. E. 257, 260; *Pittsburgh, etc., R. Co. v. Sudhoff* (1910), 173 Ind. 314, 90 N. E. 467, 472; *Cleveland, etc., R. Co. v. Clark* (1913), 51 Ind. App. 392, 97 N. E. 822, 829, 830 and cases there cited; *Louisville, etc., Lighting Co. v. Hynes* (1911), 47 Ind. App. 507, 91 N. E. 962; *Evansville, etc., R. Co. v. Allen* (1905), 34 Ind. App. 636, 73 N. E. 630.

It is also urged that the complaint shows appellee

2. guilty of contributory negligence. This being a suit for damages for injury to personal property, the burden was on appellee to allege and prove that he was free from any negligence contributing to such injury. The complaint expressly avers that appellee, while leading
3. his horse along such street was exercising reasonable ordinary care in its management and control, and that he was "at all times free of negligence or fault that in any way contributed to the injury of said horse." Nothing is shown by the specific averments, which negative or destroy the effect of this general allegation. Hence the complaint is sufficient in this respect. *Cleveland, etc., R. Co. v.*

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Clark, supra, 827, 828; *Warbritton v. Demorett* (1891), 129 Ind. 346, 352, 27 N. E. 730, 28 N. E. 613.

It is also urged that no negligence is charged against the appellant, which can be said to be the proximate cause of the injury to the horse. It is difficult to determine from the averments of the complaint just what its theory is as to the negligence relied on. From the averments above indicated it will be observed that it is charged that appellant "carelessly and negligently attached the guy wire", etc., but no causal connection is shown between the manner of attaching such wire and the injury to appellee's horse. True, it is averred that, in running the wire through the loop at the end of the guy wire, and in making the connection and splice of the wire with the rod, the end of the wire was allowed to project at right angles to the guy wire, but it is not shown that such projection had anything to do with the injury to the horse, unless it can be inferred from the averments that the horse became entangled in the wire and it "so mangled, cut and tore * * * his legs and the flesh thereon that he was ruined and became utterly worthless." It would seem from these averments when considered together, that it is the size, *presence* and location of the unguarded guy wire, and *not its condition or manner of attachment* which appellee relies on as furnishing the only cause, with which appellant was connected, that could be said to be a proximate cause of the injury to appellee's horse, and we are persuaded that the complaint proceeds upon the theory that appellant's negligence consisted in so constructing and maintaining its guy wire that it ran along and parallel with the street inside the curb and so near thereto and connecting with a guy rod so close to the ground that it was possible for a horse to get entangled therewith, and that the maintaining of a guy wire of such size, in such place and position with reference to the street and without in any way protecting or covering the wire, was in and of itself negligence. It is questionable whether on this theory,

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the averments are sufficient to show negligence when taken in connection with the other averments showing the purpose and necessity for such wire in connection with appellant's telephone system, but assuming without deciding that the general charge of negligence in the manner of the attachment of such wire and its maintenance in the manner alleged, are not overcome by the specific averments, we are confronted with the same question when we come to consider the sufficiency of the evidence to sustain the decision.

Ordinarily, negligence is a question of fact for the

4. jury or the trial judge to determine from all the facts shown by the evidence affecting such question, but where the facts are undisputed and admit of but one inference, it then becomes the duty of this court to say whether the inference drawn by the jury, or in this case by the trial judge, was authorized by the law. *Western Union Tel. Co. v. McDaniel* (1885), 103 Ind. 294, 299, 2 N. E. 709; *Jenney Electric Mfg. Co. v. Flannery* (1913), ante 424; *Indianapolis Traction, etc., Co. v. Holtsclaw* (1908), 41 Ind. App. 520, 528, 82 N. E. 986; *Cleveland, etc., R. Co. v. Clark*, supra, 831; *Indiana, etc., Trac. Co. v. Sullivan* (1913), ante 239, 101 N. E. 401, 406.

There was evidence supporting the averment that

5. appellant had permitted the end of the guy wire to project out or up at the point of its connection with the guy rod, but there was no evidence that in any way connected such projecting wire with the injury to the horse. The horse was injured in the hock joint and the point of contact with the wire was from two to four feet or more above the projecting end. There was some evidence that tended to show that the wire had been loose and sagged before the horse got his leg over it, but there was no evidence that showed or tended to show that the sagging of the wire had anything to do with causing the horse to get his leg over it, or with his becoming entangled therewith, or with his

extricating his leg after he got it over the wire, or that such sagging in any other way had anything to do with the horse's injury. So in its last analysis the only evidence which the trial court had before it which showed or tended to show a proximate cause for such injury with which appellant could be said to be connected, was that evidence which showed the size and presence of the unguarded guy wire in the place and position indicated. The manner and method of the placing and maintaining of this wire was undisputed. The wire was a quarter-inch wire attached at one end at or near the top of the pole to which appellant's telephone wires were suspended. From this point, which was about twenty-eight feet from the ground, it ran along and parallel with the street eighteen inches inside of the curb in a direct line north and connected with a guy rod anchored in the ground about 55 feet from the bottom of said pole. The point of connection between the guy wire and the guy rod was about eighteen inches above the surface of the ground.

As alleged in the complaint, the purpose of this guy wire was to support the pole which had suspended to it appellant's telephone lines. A guy wire or support of some kind was necessary. This is conceded by appellee, but it is insisted that the guy wire should have been attached to a stub pole high enough above ground that neither person nor animal would come in contact therewith. While the evidence shows that a stub pole may be, and frequently is, used for the purpose of attaching a guy wire thereto, it also shows that it then becomes necessary to secure the stub pole by an additional wire or rod anchored in the ground. There was expert evidence that the manner of attaching the guy wire adopted by appellant in this case was a usual and customary method and proper in all respects except in the matter of the projection of the wire before referred to, which had nothing to do with the injury to the horse. This evidence was undisputed. We think that the facts above indicated admit of but one inference, and hence the question

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of appellant's negligence, under the authorities before cited, is one of law and not one of fact. This exact question, so far as we have been able to ascertain, has never been decided by either of the courts of appeal of this State. Cases, however, which we think analogous have been determined by such courts.

A distinction between the roadway and the sidewalk has been recognized and declared by the Supreme Court. In the case of *Weinstein v. City of Terre Haute* (1897), 147 Ind. 556, 46 N. E. 1004, the Supreme Court at page 559 said: "The statute, section 4398, Burns' R. S. 1894 (3361, R. S. 1881) recognizes sidewalks even upon ordinary highways, and makes it unlawful to ride or drive, not only upon a sidewalk of any town or village, but also 'upon any similar sidewalk for the use of foot-passengers by the side of any public highway in this State, unless in the necessary act of crossing the same.' It is only reasonable that those who drive along a street in carriages or other vehicles should not deprive travelers on foot from the use of a narrow pathway on each side, where they may walk in safety from teams, and free from the mud of the roadway; and six feet and a half on each side of a fifty-foot street does not seem too great a space for such a use. And if such a space is not too great for the use of foot passengers, *surely it cannot be unlawful to set a hitching post at the edge of such a walk.*" (Our italics.) In the case of *Lostutter v. City of Aurora* (1891), 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259, the Supreme Court held that a municipal corporation was not guilty of maintaining a nuisance where it had constructed a platform around the mound of a well dug in the street and caused a pump to be placed in it for the use of the public. In the case of *City of Vincennes v. Thuis* (1902), 28 Ind. App. 523, 63 N. E. 315, this court held that the proper place for a public water hydrant was between the sidewalk and the roadway. The right of a telephone system to occupy the streets of a city

as a proper street use has been expressly held by our Supreme Court and the courts of many other jurisdictions. *Magee v. Overshiner* (1898), 150 Ind. 127, 137, 49 N. E. 951, 40 L. R. A. 370, 65 Am. St. 358, and cases cited. This right and its importance and benefit to the citizens of the numerous cities of our State has been expressly recognized by the legislature of our State, as evidenced by subd. 2, §8696 Burns 1908, Acts 1905 p. 219, §93, which provides that cities, by their proper authorities, may grant the use of their streets to telephone companies for the purpose of erecting and maintaining their poles and lines in and along such streets. Of course, this use must be and always is granted with reference to the primary use of the street for passage of people and vehicles and should not obstruct or unnecessarily interfere with such primary use. It

7. seems clear that every city should have a right "to determine what part of the nominal highway shall be devoted to the various purposes of passage, and upon such a subject the municipal discretion must prevail." *Herndon v. Salt Lake City* (1908), 34 Utah 65, 95 Pac. 646, 650, 131 Am. St. 827 and authorities there cited.

Appellant maintained the poles and lines in question, under the authority of an ordinance and agreement with the city of Elwood. The guy wire, here involved, was not in that part of the street which such city had determined should be devoted to the passage of horses and vehicles, and hence could not be said to be an obstruction therein. On the contrary, it was located in that part of the street recognized by the above authorities as being the proper place for its location. We think it must follow from the authorities cited that the evidence in this case fails to show appellant guilty of any actionable negligence that can be said to have been the proximate cause of the injury to appellee's horse and that for this reason the motion for a new trial should have been sustained.

Judgment reversed with instructions to the trial court

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to sustain the motion for new trial, with leave to appellee to amend his complaint, if he so desires, and for such other proceedings as may be consistent with this opinion.

NOTE.—Reported in 102 N. E. 163. See, also, under (1) 29 Cyc. 572; (2) 29 Cyc. 575, 601; (3) 29 Cyc. 578; (4) 29 Cyc. 629; (5) 29 Cyc. 629; 37 Cyc. 1647; (6) 37 Cyc. 1617; (7) 28 Cyc. 848, 866; (8) 37 Cyc. 1642, 1645. As to the burden of proof of contributory negligence, see 28 Am. Rep. 563. As to contributory negligence as a question for the jury, see 3 Am. St. 849. As to the law in relation to poles and wires of telegraph and telephone companies in streets and highways, see 28 Am. St. 229. On the question of the liability for injury or death of traveler coming in contact with electric wire in highway, see 31 L. R. A. 566; 22 L. R. A. (N. S.) 1169.

FEDERAL CASUALTY COMPANY v. TAYLOR.

[No. 8,023. Filed June 17, 1913.]

1. INSURANCE.—*Actions.—Complaint.—Sufficiency.—Performance of Conditions.*—A complaint on an accident insurance contract which sets out the contract as an exhibit and alleges generally the performance of all the conditions thereof by the plaintiff, and also states the time, place and nature of the injury suffered by plaintiff, was sufficient to withstand a demurrer. p. 566.
2. APPEAL.—*Questions Reviewable.—Sufficiency of Evidence.*—No question can be presented on appeal on the sufficiency of the evidence unless its insufficiency was assigned in the motion as a cause for new trial. p. 566.

From Superior Court of Marion County (82,544);
Charles J. Orbison, Judge.

Action by William F. Taylor against the Federal Casualty Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George Burkhardt, for appellant.

F. F. James, for appellee.

ADAMS, C. J.—This was an action by appellee against appellant on a contract of insurance, wherein appellant, in consideration of a certain monthly premium, agreed to pay appellee a stipulated indemnity in case of total or partial

disability, on account of accident. The action was originally brought before a justice of the peace, where a judgment was rendered in favor of appellee, from which appellant appealed to the Marion Circuit Court, where the cause was transferred to the Marion Superior Court, and a second paragraph of complaint filed. A demurrer for want of sufficient facts was addressed to this paragraph of complaint, and overruled by the court. Trial by jury, verdict and judgment for appellee.

The errors assigned and relied on for reversal are, the overruling of appellant's demurrer to the second paragraph of complaint, and the overruling of appellant's motion for a new trial. As to the first error assigned, it is sufficient

to say that the contract sued on was set out as an

1. exhibit to the second paragraph of the complaint, full performance of all the conditions of the contract on the part of appellee was alleged, and the time, place and nature of the injury suffered by him fully set out. Section 376 Burns 1908, §370 R. S. 1881, provides that "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegation be denied, the facts showing a performance must be proved on the trial." There was no error in overruling a demurrer to this paragraph of complaint. *Pacific, etc., Ins. Co. v. Turner* (1897), 17 Ind. App. 644, 47 N. E. 231; *Voluntary Relief Dept., etc. v. Spencer* (1897), 17 Ind. App. 123, 125, 46 N. E. 477.

Under the second assignment of error, appellant

2. insists that the evidence fails to show that the contract of insurance was in force at the time appellee was injured. While the motion for a new trial is not set out in appellant's brief, we have examined the record, and find that the insufficiency of the evidence to sustain the verdict is not assigned in the motion as a cause for a new trial. Without such assignment, no question is presented on the

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sufficiency of the evidence. *Gates v. Baltimore, etc., R. Co.* (1900), 154 Ind. 338, 342, 56 N. E. 722; *Stevens v. Leonard* (1900), 154 Ind. 67, 69, 56 N. E. 27, 77 Am. St. 446; *Baltimore, etc., R. Co. v. Daegling* (1902), 30 Ind. App. 180, 182, 65 N. E. 761; *Hubbs v. State, ex rel.* (1898), 20 Ind. App. 181, 182, 50 N. E. 402.

The judgment is affirmed.

NOTE.—Reported in 102 N. E. 146. See, also, under (1) 1 Cyc. 285, 286; (2) 29 Cyc. 747, 748.

SHUEY v. LAMBERT, EXECUTOR.

[No. 8,024. Filed June 17, 1913.]

1. EXECUTORS AND ADMINISTRATORS.—*Final Report.—Exceptions.—Sufficiency.*—Exceptions by a husband to the final report of the executor under the will of his deceased wife, denying the executor's right to credit for certain expenses of last sickness and funeral incurred without the knowledge or consent of the husband, and for the payment of the debts of the estate and costs of administration, as against such husband's one-third interest in the proceeds of the sale of his wife's real estate, were sufficient to challenge the executor's right to obtain credit for the several items so as to reduce the amount due such husband below such one-third. p. 571.
2. EXECUTORS AND ADMINISTRATORS.—*Exceptions to Final Report.—Amended Report.—Effect.*—Where exceptions are sustained to the final report of an executor, his amended report, filed in obedience to the order of the court, is not filed in the sense of an amended pleading, but such report as amended and approved by the court is in fact the judgment of the court, so that exceptions to the conclusions of law stated on the trial of exceptions to a final report are effective to test the correctness of such conclusions on any question raised by the exceptions to such report, unless the amendments ordered and made have cured the error, if any, shown by such original exceptions. p. 572.
3. EXECUTORS AND ADMINISTRATORS.—*Objections to Approval of Amended Report.—Motion for New Trial.*—The correctness of the court's approval of the amended final report of an executor may be tested by a motion for a new trial on the ground that the decision of the court is not sustained by sufficient evidence and is contrary to law. p. 572.

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4. EXECUTORS AND ADMINISTRATORS.—*Final Report.—Claims for Credits.*—The claims of an executor in his final report for credits against the funds of the estate are in the nature of separate complaints, or allowances, and exceptions thereto place the burden on the executor to establish by competent evidence the correctness of his report as to all matters embraced in such exceptions. p. 572.
5. EXECUTORS AND ADMINISTRATORS.—*Final Report.—Exceptions.*—The final report of an executor and the exceptions thereto stand as the complaint and answer of the respective parties. p. 572.
6. EXECUTORS AND ADMINISTRATORS.—*Final Report.—Exceptions.—Findings.*—The rule that the failure of the court, in making a special finding, to find a material fact is the equivalent of finding such fact against the party having the burden of proving the same, is applicable to a trial of the exceptions to the final report of an executor. p. 573.
7. DESCENT AND DISTRIBUTION.—*Husband and Wife.—Debts.—Estoppel.*—Under the provisions of §3016 Burns 1908, Acts 1891 p. 71, the surviving husband of a deceased wife is entitled to one-third of her real estate, subject only to its proportion of her antenuptial debts, unless he has in some way waived his right thereto, or estopped himself to assert such right. (*Kinney v. Heuring* [1909], 44 Ind. App. 590, distinguished.) p. 573.
8. DESCENT AND DISTRIBUTION.—*Husband and Wife.—Debts.—Mortgages.—Expenses of Last Illness and Funeral.*—Conclusions of law that the husband's one-third in the proceeds of the sale of his deceased wife's real estate was subject to the payment of a proportionate part of a certain mortgage and of the expenses of the illness and funeral of the wife, as well as certain expenses of administration, were erroneous where it was not shown that the mortgage was for the wife's antenuptial debt, nor that the husband had joined in its execution or even that it covered her real estate, and it was shown that the other expenditures were incurred without his knowledge and that credit therefor was not extended to him, but to the estate. p. 574.

From Elkhart Superior Court; *Vernon W. Van Fleet*, Judge.

Exceptions by James Francis Shuey to the final report of Melvin A. Lambert, executor of the will of Malissa Alice Shuey, deceased. From a judgment approving the final report as amended, the executor appeals. *Reversed.*

C. C. Raymer, for appellant.

James L. Harman, for appellee.

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FELT, J.—Appellant excepted to the final report of the appellee as executor of the will of his deceased wife, Malissa Alice Shuey. Appellant's wife died testate, in the state of Michigan, on April 6, 1909, the owner of real estate in Elkhart County, Indiana, worth approximately \$4,000 and also left an estate in Michigan of about \$600. Appellant at the time of his wife's death and at the time she went to Michigan, was a resident of Argenta, Illinois, where he was postmaster. Decedent's will was duly probated in the state of Michigan, where she was residing at the time of her death. Appellee, Melvin A. Lambert, qualified as executor of the will and also caused the same to be duly recorded in Elkhart County, Indiana, as by law provided, where ancillary proceedings were had in said estate.

By the terms of the will appellant was given no part of the estate of his deceased wife, though she referred to him as her beloved husband and gave as her reason for not willing him any part of her property that she believed his children would get it from him and she did not want them to have it. Appellant filed his election to take under the law of descent of the State of Indiana, and asked that the assets of the estate be marshalled and that no part of his one-third of the Indiana real estate be used to pay debts of the estate. The Indiana real estate was sold by the executor on order of court and the executor charged himself with all the proceeds of the sale in his final report.

Trial was had on appellant's exceptions to appellee's final report in said estate and on request the court made a special finding of facts and stated its conclusions of law thereon. Appellant duly excepted to each conclusion of law and thereupon in pursuance of the order of the court appellee filed an amended final report which was approved by the court to which approval appellant duly excepted. Appellant thereupon filed his motion for a new trial on the ground that (1) the decision of the court is contrary to law, and (2) is not

sustained by sufficient evidence. The motion for a new trial was overruled, appellant excepted and appealed to this court.

The errors assigned are, that the court erred in each of its first, fourth and fifth conclusions of law; in approving the amended final report of appellee and in overruling appellant's motion for a new trial.

The facts as far as material to the questions to be decided, in addition to those already stated, are in substance as follows: that the estate is pending and unsettled in Saint Joseph County, state of Michigan; that appellee received from the sale of Indiana real estate \$4,050 and rents amounting to \$199.05 and claimed credits against the same aggregating \$3,162.56. As against appellant these credits were deducted from the price of the real estate, leaving a balance of \$887.44, the one-third of which, or \$295.82, according to the amended report, is due appellant as his share of the proceeds from the sale of the real estate. The credits deducted from the money received from the sale of the real estate included court costs and other expenditures incident to the sale of the real estate, taxes, part of the executor's fees and expenses, \$190 of \$225 attorney's fees allowed in the estate, a mortgage paid appellee of \$2,575.80, \$66.00 for medical services rendered decedent in her last sickness by a physician in Michigan, and \$90 for a burial casket, which was ordered by appellee. The court also found that the assets of the estate are not sufficient to give to appellant one-third of the real estate in Indiana free from debts, and that a part thereof is required to pay the debts of said estate; that appellee Melvin A. Lambert was the brother of decedent and at the time of her sickness and death appellant was at his home in Illinois, and his location was well known to appellee and the other relatives of decedent who intentionally failed to notify appellant of his wife's sickness and death, though they had ample opportunity and time to have done so before her death; that he did not learn thereof until after she was dead and buried; that they failed to so notify

him in order that he should be deprived of the opportunity of purchasing his wife's burial casket or attending her funeral.

The first conclusion of law is that the one-third interest of appellant in said real estate is subject to the indebtedness of decedent in so far as is necessary to pay the debts of her estate. The fourth is that appellant is not personally liable for \$90, the alleged cost of a casket purchased in Michigan for his deceased wife without his knowledge or approval, but that the same is a proper charge against her estate. The fifth is that \$66 paid a physician in Michigan is a proper charge against the estate and should be allowed as a credit to the executor.

Appellant's amended exceptions to appellee's final

1. report challenged the right of appellee to charge in his account and obtain credit for certain expenses of last sickness and funeral incurred in the state of Michigan, without his knowledge or consent and also certain costs of administration in that state; that at the time of the death of his wife, his property of every kind and character did not exceed \$300 and she had an estate worth \$5,000; that by the laws of Indiana he was entitled to one-third of the Indiana real estate free from debts of the estate contracted after marriage, and the Elkhart Circuit Court had previously entered an order to that effect; that in violation of said order and contrary to law, appellee has used and expended the greater part of the proceeds of the sale of appellant's one-third of said real estate in payment of debts of said estate and for costs of administration; that the debts so allowed and paid were contracted by decedent subsequent to her marriage with him. Appellant's exceptions to the final report were sufficient to challenge the right of the appellee to obtain credit for the several items so as to reduce the amount due him below the one-third part of the proceeds from the sale of the Indiana real estate. *Major v. Miller* (1905), 165 Ind. 275, 278, 75 N. E. 159.

Where exceptions are filed to a final report of an executor, and upon trial of the issues so joined, some of the exceptions are sustained, and the executor ordered to amend his report in accordance with the finding of the court, which he does, and the court thereupon approves the report, it has been held that such amended report filed in obedience to the order of the court after trial of the exceptions, is not filed in the sense of an amended pleading, and that the report as amended and approved in such case, is in fact the judgment of the court. From this it follows that appellant's exceptions to the conclusions of law are still effective to test the correctness of such conclusions on any question affecting his legal rights which was originally raised by such exceptions, unless the amendments ordered by the court and made by the executor have cured the error, if any, shown by such exceptions when taken. *McDonald v. Moak* (1900), 24 Ind. App. 528, 57 N. E. 159; *Johnson v. Central Trust Co.* (1903), 159 Ind. 605, 608, 65 N. E. 1028.

In *McDonald v. Moak*, *supra*, it is also held that a motion for a new trial on the ground that the decision of the court is not sustained by sufficient evidence and is contrary to law, is a proper way to test the correctness of the court's approval of such amended report. See, also, *Wolverton v. Wolverton* (1904), 163 Ind. 26, 31, 71 N. E. 123.

The claims of an executor in his final report for credits against the funds of the estate are in the nature of separate complaints, or allowances, and exceptions thereto place the burden on the executor and require him to establish by competent evidence the correctness of his report in respect to all matters embraced in the exceptions. The report and the exceptions thereto stand as the complaint and answer of the respective parties. *Spray v. Bertram* (1905), 165 Ind. 13, 74 N. E. 502, and cases cited; *Wyson v. Nealis* (1895), 13 Ind. App. 165, 169, 41 N. E. 388. The rule also applies that

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where the court makes a special finding, failure to
6. find a material fact is the equivalent of finding such fact against the party having the burden of proving the same. *Wysong v. Nealis*, *supra* 173; *Hibben, etc., Co. v. Hicks* (1901), 26 Ind. App. 646, 649, 59 N. E. 938; *Henry v. Central Trust Co.* (1907), 40 Ind. App. 369, 370, 82 N. E. 120. Section 3016 Burns 1908, Acts 1891 p. 71, provides:

“If a wife die testate or intestate leaving a widower,
7. one-third of her real estate shall descend to him, subject, however, to its proportion of the debts of the wife contracted before marriage.” Under this statute appellant asserts his right to the full one-third part of the proceeds from the sale of the Indiana real estate, and claims that none of the credits by which his interest is reduced, is for a debt contracted prior to his marriage to the decedent. It is settled by the decisions of this and our Supreme Court that under the aforesaid statute, the surviving husband of a deceased wife, is entitled to one-third of her real estate, subject only to its proportion of her debts contracted before marriage, unless he has in some way waived his right thereto, or estopped himself to assert such right. *Kemph v. Belknap* (1896), 15 Ind. App. 77, 43 N. E. 891; *Weaver v. Gray* (1906), 37 Ind. App. 35, 39, 76 N. E. 795; *Banta v. Smith* (1908), 41 Ind. App. 364, 366, 83 N. E. 1017; *Roach v. White* (1884), 94 Ind. 510, 512; *Herbert v. Rupertus* (1903), 31 Ind. App. 553, 555, 68 N. E. 598; *Leach v. Rains* (1897), 149 Ind. 152, 157, 48 N. E. 858. In the case of *Kinney v. Huerling* (1909), 44 Ind. App. 590, 87 N. E. 1053, 88 N. E. 865, this court in an opinion written by Rabb, J., criticised the reasoning and conclusion of the cases holding that the husband takes his one-third of the deceased wife's real estate free from her post-nuptial debts, but under the rule of *stare decisis* recognized the question as settled and announced that it had become a rule of property. The court, however, held that it was not inclined to extend the application of the rule and refused to follow it in that case because the question

involved a mortgage, in the execution of which the husband had joined, and other specific liens, on real estate, and for the further reason that the question there arose between heirs to the property and did not involve the question of the payment of general debts of the estate of the deceased wife out of the fund derived from the sale of the husband's one-third part of real estate inherited from her. In *Hampton v. Murphy* (1910), 45 Ind. App. 513, 86 N. E. 436, 88 N. E. 876, this court in passing upon the rights of a surviving husband under §3016, *supra*, said on page 519 "It is not therefore subject to the payment of the general debts of the deceased wife. He takes the one-third under the statute absolute, and his right cannot be molested, except in case where he has waived it by agreement or has estopped himself from any claim to it. * * * If the husband has joined his wife in the execution of a mortgage upon her real estate he is estopped from denying the jurisdiction of the probate court to order all the real estate sold thus mortgaged, if necessary to pay and discharge the mortgage lien."

The finding of facts shows the payment of a mortgage to Melvin A. Lambert by the executor amounting to \$2,575.80 but it does not show that this mortgage was for a debt contracted before marriage nor does it appear that the husband joined in its execution or even that it was upon the real estate sold by appellee. If the mortgage was executed before marriage, by the terms of the statute the husband's interest is subject to its proportion of the debt. The court stated its conclusions separately as to the items for the physician's services and the burial casket. These items were filed and allowed as credits against the funds of the estate derived from the sale of the Indiana real estate, and the court found that each item is a proper charge against the estate and should be allowed as a credit to the executor, and also approved the amended report which deducted one-third of the amount

from appellant's share of the Indiana real estate. If the court was warranted in finding these items to be debts of the estate, it follows that they are not debts of the appellant. No facts are found to show that they are debts of the decedent for which appellant's interest in the real estate may be taken in payment, and therefore it was error to deduct one-third of these items from appellant's share of the Indiana real estate. Appellee contends that on the facts of this case appellant was personally liable for all of these bills and cannot therefore complain when he is only charged with one-third of the amount. The conclusions already reached show the error of this position. The facts found do not show that credit was extended to appellant or that he became liable for any part of these bills. He is not shown to have waived his right under the statute or to have estopped himself to claim his full one-third part of the Indiana real estate as against these items. The findings that said items were proper charges against the estate is more of a conclusion of law than a finding of fact, but if given any effect at all as a finding, it would necessarily be against appellee as showing that credit was not extended to appellant but to the estate. It therefore follows from the finding of facts that no part of said claims can be deducted from appellant's share of the funds derived from the sale of the Indiana real estate. The finding as a whole is defective and incomplete. It should have covered all the facts involved in the report and found all the ultimate facts in issue. As presented, it does not warrant the conclusions of law or sustain the judgment rendered. As throwing some light on questions more or less involved in this controversy we cite the following: *Oinson v. Heritage* (1873), 45 Ind. 73, 75, 15 Am. Rep. 258; *Rariden v. Mason* (1903), 30 Ind. App. 425, 427, 65 N. E. 554; *Arnold v. Brandt* (1896), 16 Ind. App. 169, 44 N. E. 936; *Eiler v. Crull* (1885), 99 Ind. 375; *Litson v. Brown* (1866), 26 Ind. 489;

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Schouler, Husband and Wife §§119, 120; Schouler, Domestic Relations (4th ed.) §§69, 70; 15 Am. and Eng. Ency. Law (2d ed.) 883-888; 21 Cyc. 1223.

The judgment is therefore reversed with instructions to the lower court to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

Adams, C. J., Hottel, P. J., Lairy, Ibach and Shea, JJ., concur.

NOTE.—Reported in 102 N. E. 150. See, also, under (1, 5) 18 Cyc. 1171; (2) 18 Cyc. 1171, 1174; (3) 29 Cyc. 724, 725, (4) 18 Cyc. 1180; (6) 38 Cyc. 1985; (7) 14 Cyc. 81; (8) 14 Cyc. 126, 199. As to courtesy and statutory regulation of it, see 128 Am. St. 487.

HILLIS v. DILS ET AL.

[No. 7,844. Filed February 18, 1913. Rehearing denied June 19, 1913.]

1. DESCENT AND DISTRIBUTION.—*Husband and Wife.—Debts.*—Under §3016 Burns 1908, Acts 1891 p. 71, a surviving husband acquires one-third of his deceased wife's real estate free from her postnuptial debts. p. 579.
2. WILLS.—*Construction.—Disposition of Real and Personal Property in Same Words.*—Where a will purports to dispose of real estate and personal property in the same words, and in the same connection, and it is manifest that the testator intended both to go together, it will be so construed. p. 580.
3. WILLS.—*Construction.—Disposition of Personal Property.*—Bequests of personal property are absolute gifts unless something appears in the will to the contrary, since it is a *prima facie* rule of construction that a testator by his will disposes of his entire estate. p. 580.
4. WILLS.—*Construction.—General Rule.*—In the construction of a will, the court should take into consideration all its provisions, and from them place such a construction thereon, consistent with the established principles of law, as will carry into effect the general scheme and purpose of the testator. p. 580.
5. WILLS.—*Construction.—Disposition of Personal Property.*—Where a testatrix devised her home to her daughter "subject to the conditions hereinafter stated," and in another clause gave all the residue of her estate to her grandsons and to such daughter,

and provided that on the death of the daughter before the death of the grandchildren the legacies given her should go to them to the exclusion of her surviving husband, an unrestricted gift to the daughter was thereby indicated in which such grandsons had no vested rights, so that they could have no claim against the estate of such daughter as to her share under such will for any sum beyond that which might remain at her death. p. 580.

6. **WILLS.—*Determinable Fee.—Nature of Interest.***—The owner of a determinable fee in real estate has all the right of an owner in fee simple in regard to the use or disposal of the real estate, save that his fee is liable to be defeated at any time by the occurrence of the designated contingency, and that in the event of a sale by him, his purchaser would also take a determinable fee. p. 581.
7. **WILLS.—*Disposition of Personal Property.—Enjoyment by Holder of Defeasible Interest.***—Although one who holds only a limited interest in personalty bequeathed to him may not use it in a manner destructive of the rights of others interested therein, the holder of a defeasible absolute interest in personal property has the right to get the full benefit of it, even to the extent of using it in such a way that it may be consumed. p. 581.
8. **APPEAL.—*Request for Oral Argument.—Briefs.***—A request for oral argument must be seasonably made, before the time for filing briefs has expired and before their consideration by the court; and while it is not improper to incorporate a petition for oral argument in the brief, where it is so incorporated, the cover page of the brief should show that fact in order that it may be brought to the attention of the clerk for filing, since the court will not search the briefs to determine if counsel desire an oral argument. p. 582.

From Decatur Circuit Court; *Marshall Hacker*, Judge.

Action by Culver M. Hillis against Edwin J. Dils and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

John E. Osborn, Lewis A. Harding and Horace C. Skillman, for appellant.

John H. Parker, George L. Tremain and Rollin A. Turner, for appellees.

IBACH, C. J.—On August 6, 1896, Catherine Black executed her last will and testament. She died sometime dur-

ing the year 1897. So much of her will as is relevant to this appeal follows: "Know all men, that I, Catherine Black, do make and publish this my last will and testament. First. I give and bequeath to my daughter, Tillie A. Dils, my house and lot in which I now live, subject to the conditions hereinafter stated. Second. I give and bequeath to my grandson, Culver M. Hillis, one bed and bedding and one gold watch which was bought for his mother. Third. All the residue of my estate, real and personal or mixed, I will and bequeath equally to my grandsons, Culver Hillis and Dwight A. Charlton, and my daughter, Tillie A. Dils. And further, I direct that in case of the death of my daughter, Tillie A., before the death of my grandchildren, or either of them, all of her legacies given in any item of this will shall revert or descend to my surviving grandchildren, or either of them if the other is dead, to the exclusion of her surviving husband if he survives her. If either legatee dies, his or her portion shall go to the survivors."

In the settlement of the estate of Catherine Black and the distribution of the proceeds thereof, after the payment of all debts, \$2991.38 was distributed according to the terms of the will, that is, \$997.12 was given to each of the legatees mentioned therein. It appears also from the complaint and answer that Tillie A. Dils died on October 11, 1908, intestate, leaving as her sole heirs at law her husband, appellee Dils, and her son, appellee Charlton. At the time of her death she was the owner in fee simple and free from incumbrance of 190 acres of land valued at \$50 per acre and was possessed of personal property valued at \$210, in addition to her interest in the house and lot given to her by the will of Catherine Black.

Appellant filed his complaint against both appellees as a creditor of Tillie A. Dils, claiming in substance that he is entitled, as one of the surviving legatees under the will of Catherine Black, to one-half of the aforesaid sum of \$997.12, paid to Tillie A. Dils, or \$498.56, and that, since the estate

of Tillie A. Dils was settled without paying such sum to him, he being at the time of settlement a minor, appellees are now liable to him for its payment.

Appellee Dils, being the surviving husband of said Tillie A. Dils, took his share of her estate as such under §3016

Burns 1908, Acts 1891 p. 71, which share was one-

1. third of her real estate free from her debts, and took no share as her heir, consequently his interest in her separate real estate could not be subjected to the payment of appellant's claim in any event, and the court very properly sustained appellee Dils' demurrer to the complaint.

Appellee Charlton averred in his answer, among other things, that said Tillie A. Dils had, during her life, used, spent and disposed of all of the money paid her as one of the legatees under the will, and had no part of it remaining at the time of her death, and therefore there was no portion of such fund remaining for distribution to appellant. Appellant's demurrer to this answer was overruled, and this action of the court is the only remaining error assigned, and presents the only important question in the case. In the case of *Pulse v. Osborn* (1903), 30 Ind. App. 631, 64 N. E. 59, the will of Catherine Black under consideration was construed with reference to the house and lot devised to Tillie A. Dils, and the court held that she acquired a determinable fee in such real estate, (that is, she became the owner in fee of the real estate, subject to be defeated in case of her death before that of appellant Hillis and appellee Charlton, and liable to become owner in fee simple in the event of their deaths occurring before hers) and that Hillis and Charlton had no vested interest in such real estate until her death. The question before us for determination is, Was the interest of Tillie A. Dils in the personal property bequeathed to her upon the same conditions as the real estate, such an interest that she might use, spend and dispose of such personal property during her life, without making her estate liable for its value to Hillis and Charlton?

It was said in the case of *Mulvane v. Rude* (1896), 146 Ind. 476, 481, 45 N. E. 659: “Whenever a will purports to dispose of real estate and personal property in the
2. same words and in the same connection and it is manifest that the testator intended both to go together, it is held that the will must be so construed.” Both appellant and appellee rely upon holdings such as the above to substantiate their argument that Tillie A. Dils took an interest in the personalty bequeathed to her by her mother’s will, exactly similar to the interest she took in the real estate devised to her by the same instrument, that is, a defeasible fee. They differ as to what are the rights of the holder of a defeasible fee in personalty.

At common law the rule in bequests of personal property was different from that concerning devises of real estate, and the question in bequests of personal property was,
3. whether the context of the will showed an intention to give anything less than the absolute ownership of the property, and if no such intention appeared, the absolute ownership was held to pass. This rule applies with even greater force under modern law, where the *prima facie* rule of construction is, that the testator is disposing of his entire estate. So it is the rule that gifts of personal property are absolute gifts unless something appears in the will to the contrary. Page, Wills §595.

It is our duty in the construction of the will before us to take into consideration all of its provisions and from them to place such a construction upon it, consistent with
4. the established principles of law, as will carry into effect the general scheme and purpose of the testator. Keeping this general principle in mind, we are con-
5. vinced from the language employed by the testator that it was her purpose and intent in disposing of her property to eliminate from all consideration the daughter’s husband, appellee Dils, but that her daughter should enjoy to the fullest extent her entire estate, both real and

personal, giving to her the fee in the land, subject only to be defeated in case of the daughter's death before that of the grandchildren, and a similar title to the personal property. The will contains nothing to restrict the use of the personal property as to time, manner, or form, nothing that would indicate a trust, or that there was a limitation to the income of the legacy, but rather the language used indicates an unrestricted gift in which the grandchildren had no vested rights before her death, and would have no claim against her estate for any sum beyond that which might remain at her death.

The owner of a determinable fee in real estate has all the right of an owner in fee simple in regard to the use or disposal of the real estate; he may use it in any way,

6. may cut and sell the trees growing upon the land, strip the sod and clay from its surface, take out the minerals from underneath, sell it without restriction; his rights being equivalent to those of an owner in fee simple, save that his fee is liable to be defeated at any time by the occurrence of the contingency by which it is determined, and if he should sell, his purchaser would also take a determinable fee. But no owner of real estate can entirely use up or destroy his property, though he may so use it as to make it of less value than it possessed when he acquired it. From the nature of real property, however used, there will always be left a portion of the earth's surface from the ownership of which the holder of a determinable fee is liable to be divested, although he may have denuded it to bare rock, and made it practically valueless for any purpose, and in so doing have remained wholly within his legal rights. See, *Gannon v. Peterson* (1901), 193 Ill. 372, 62 N. E. 210, 55

L. R. A. 701. Personal property is of a different

7. nature, and its absolute owner is privileged to use it in any way, but since from the nature of personal property it may be entirely consumed or destroyed by using it, the holder of a defeasible absolute interest in personal

property has the right to get the full benefit of it, even to the extent of using it in such a way that it may be consumed. This is not the rule in cases where it appears from the will itself that a limited interest only in personalty was bequeathed, but such we do not find here.

It follows that the answer of appellee setting forth the facts relative to the manner in which the fund sued for was obtained originally, and showing that it had all been spent by Tillie A. Dils during her lifetime, and that none of it remained at the time of her death, was a complete defense to appellant's claim, and the trial court did not err in overruling appellant's demurrer thereto.

Judgment affirmed.

ON PETITION FOR REHEARING.

IBACH, J.—Appellant, in his brief for rehearing has urged the same matters presented in his original brief. In addition, he insists that the court should have granted his application for oral argument. No petition for oral argument was filed with the clerk of this court, or in any way brought to the court's attention so that the court could ascertain from the files of the clerk, or the clerk's memorandum on the transcript, that there had been a request for oral argument. On the last page of appellant's original brief, just above the signature of counsel, counsel asked an oral argument.

A request for oral argument must be seasonably made, before the time for filing briefs has expired, and before consideration by the court, and the court is not re-

8. quired to search the briefs in order to find out whether counsel desire an oral argument. in this case the request was not discovered until after the case had been partially considered, and a decision practically agreed upon. It is undoubtedly the rule that a party in this court is entitled to an oral argument, under Rule 26 of this court, in all cases where a proper written application has been

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filed, but the request for oral argument must be made in such form that it can be ascertained by the court before reading the briefs through for final consideration of the case. It is not improper to incorporate a petition for oral argument with the appellant's or appellee's brief, but if this is done, the cover page of the brief should show that it contains the party's brief, and his petition for an oral argument, in order that the latter be brought to the attention of the clerk of the court for filing, and to the attention of the court when the cases are distributed for decision. Appellant failed to make a proper application for oral argument, therefore he was not entitled to oral argument.

Petition for rehearing denied.

NOTE.—Reported in 100 N. E. 1047; 102 N. E. 140. See, also, under (1) 14 Cyc. 69; (2) 40 Cyc. 1525; (3, 5) 40 Cyc. 1607; (4) 40 Cyc. 1413; (6) 16 Cyc. 602; (7) 16 Cyc. 619; 40 Cyc. 1997; (8) 3 Cyc. 210. As to testator's intent as test of quality of bequest, see 140 Am. St. 613. As to right of first taker to consume estate in cases of bequest for life, see 139 Am. St. 73. For a discussion of the interest given by a general bequest of personalty with an unlimited power of disposition, see 17 Ann. Cas. 480.

WABASH RAILROAD COMPANY ET AL. v. GRATE.

[No. 7,966. Filed June 19, 1913.]

1. **FRAUD.—Actions.—Complaint.**—A complaint by a property owner against a railroad company for damages resulting from defendant's removal of its shops, etc., to another city, is insufficient on the theory of fraud, notwithstanding some of its averments indicate that it proceeds on the theory that plaintiff was induced to purchase his property by defendant's fraudulent representations, where it contains no averments that such representations were false, or that they were fraudulently made knowing them to be false, or that they were recklessly made not knowing whether they were true, or that they were made for the purpose of cheating or defrauding plaintiff. pp. 588, 589.
2. **FRAUD.—False Representations.—Existing or Past Facts.—Representations as to Future Acts.**—Alleged statements, representations, acts and conduct which were not made with reference to an alleged existing or past fact, but which relate to and are repre-

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sentations, statements and conduct with reference to a thing to be done in the future, are insufficient grounds on which to predicate fraud. p. 589.

3. **CONTRACTS.—Complaint.—Presumptions.**—Where it is not alleged in the complaint that the contract relied on was in writing, it will be presumed to be verbal. p. 591.
4. **CONTRACTS.—Actions.—Variance.**—Where plaintiff alleges an oral contract, he is bound thereby, and will not be permitted to recover on proof showing that it was in fact in writing. p. 595.
5. **EVIDENCE.—Parol Evidence.—Written Contract.**—Where a written contract appears to be complete, it is presumed to be the repository of the final intention and agreement of the parties, and it cannot be changed, modified, added to or subtracted from by proof of any prior or contemporaneous parol agreement, except as to the consideration, which may be contradicted by parol, unless from the language of the writing it appears that the stipulation as to the consideration is contractual. p. 595.
6. **RAILROADS.—Location of Division Buildings.—Maintenance.—Contract.—Evidence.**—In an action for damages against a railroad company on account of the removal of its shops, etc., to another city, plaintiff alleging that he purchased certain real estate in the town where such shops, etc., were originally located because of defendant's representations that it would locate and maintain its shops, etc., there, evidence of certain written contracts, neither of which contained any agreement that defendant would permanently maintain its shops, etc., in such town, and the representations of defendant's officers as to the intended permanency of such location of shops, etc., was insufficient to support a judgment for plaintiff on the theory of a contract between defendant and plaintiff binding defendant to maintain its shops, etc., at such town. p. 597.

From Superior Court of Allen County; *Owen N. Heaton*, Judge.

Action by George Grate against the Wabash Railroad Company and another. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Edwin P. Hammond, William V. Stuart, Dan W. Simms, Allison E. Stuart and Fred E. Zollars, for appellants.

Thomas L. Wickwire and Colerick & Hogan, for appellee.

HOTTEL, P. J.—This is an appeal from a judgment recovered by appellee in an action brought by him in the Dekalb Circuit Court against appellants to recover damages

alleged to have resulted to appellee on account of the removal by appellant railroad company from the town of Ashley in said county, its division terminal and headquarters, and the resulting abandonment and dismantlement of the roundhouse, shops and other structures necessary to and connected with said division terminal at said place. The complaint is in a single paragraph a demurrer to which was overruled. Appellants filed a separate and several answer in six paragraphs. The first paragraph of this answer was a general denial; the second paragraph alleged that the contracts were not in writing; the third and fourth paragraphs each set up the six years' statute of limitations; the fifth paragraph alleged that the contracts were without consideration and the sixth paragraph alleged performance of the contracts sued on. The sufficiency of the special answers was not questioned by demurrer, and the only reply thereto was a general denial. There was a trial by jury and a finding and a general verdict against both appellants. With the general verdict the jury returned answers to interrogatories. Each appellant filed in the following order a motion for judgment on the answers to interrogatories notwithstanding the general verdict, a motion for a new trial, and a motion in arrest of judgment. These several motions were each overruled and each appellant saved an exception to each ruling. These rulings and the ruling on the demurrer to the complaint are each assigned as error and relied on for reversal.

Many objections are urged against the sufficiency of the complaint and in their discussion of these objections and the other errors relied on, appellants have presented several questions to which there seem to be no decisions of either of the courts of appeal of this State directly applicable. In some of the objections to the complaint questions are presented concerning which we are not free from doubt, but assuming, without deciding, that the complaint states a cause of action, we have reached the conclusion that the

evidence wholly fails to support the theory upon which it must be held to be predicated, and for this reason limit our discussion and decision of the questions presented to those alone which involve the theory of the complaint and the sufficiency of the evidence to support such theory.

The material averments of the complaint are in substance as follows: In January, 1892, appellant railroad company owned and operated certain lines of railroad, and desired to build an additional line from the town of Montpelier, Ohio, through Indiana, to the city of Chicago, and to obtain at some suitable place along such proposed line, and adjacent thereto, a sufficient quantity of land (not less than 100 acres) about one mile in length on which to establish its division headquarters and terminal, and erect depots, round-house, side tracks, yards and all other necessary buildings in connection therewith. To have acquired such land from the owners by direct purchase or by condemnation, would have cost such company a price far in excess of the actual acreage value thereof, because of the manner in which the farms, comprising the land, would have been cut up, and to avoid paying such excessive price, and as an agency through which to purchase such land at a reasonable price, appellant railroad company on March 14, 1889, through its officers and directors procured and caused the organization of the appellant, Indiana Improvement Company. The articles of incorporation of such company stated that it was organized for the purpose of buying and selling lands, etc., but the real purpose of organizing such corporation was to enable appellant railroad company to acquire through its agency the land needed by it, at a reasonable price, and at the same time enable the organizers and stockholders of the improvement company to make a profit by platting into town lots and selling the lands purchased by it and not used by the railroad company, it being agreed by the railroad company that in consideration of the anticipated benefits to be derived by it from said transaction it would construct and perma-

nently maintain on the land purchased by it all of the offices, buildings and structures aforesaid and to fully equip, operate and maintain said division headquarters thereon, thereby giving to said town lots a permanent and enhanced value, and also enabling appellant improvement company to more readily dispose of the same at a profit. The officers, directors and stockholders of the improvement company, were, with but one exception, also officers and directors of the railroad company, and 7/8 of the capital stock of such improvement company was owned by officers, directors and stockholders of the railroad company. The improvement company was practically an auxiliary to the railroad company and was controlled and governed by the same men, and it with full knowledge and consent of the railroad company purchased and acquired title to more than seven hundred acres of land in the counties of Steuben and Dekalb, and platted thereon the town of Ashley, and procured the same to be incorporated as a town under the laws of the State of Indiana, and conveyed to the railroad company, 112 acres of said land for the uses above specified, which land was conveyed for its actual acreage cost to said improvement company, which company, with knowledge of the railroad company, and for the purpose of inducing appellee and others to purchase lots and invest money in the improvement and development of the town of Ashley, represented and agreed with appellee and others that if they would purchase lots and improve them, said railroad company would locate and permanently maintain all of the buildings, structures, etc., aforesaid and would fully equip, operate and maintain said division terminal and headquarters at said point; that the railroad company would give employment to a large number of persons at said place, who, with their families, would be sufficient in number to give to said town a population of from 6,000 to 10,000 persons, all of whom would become permanent residents thereof. Said promises, undertakings, inducements and agreements

thus made by the improvement company were all made with the full knowledge and consent of the officers and directors of the railroad company, and were all ratified and adopted by it as its personal promises, agreements and undertakings, and were all made for the purpose of inducing appellee and others to purchase said town lots and to erect buildings thereon. As a further inducement to appellee, the railroad company did establish a division headquarters and division terminal at said point and did erect certain offices, buildings, structures, etc., thereby giving employment to a large number of persons who became and were inhabitants of said town, and also, thereupon agreed with appellee and publicly announced that it was the purpose and intention of appellant railroad company to keep and perform each and all of the several promises, agreements and undertakings of said Indiana Improvement Company. Relying thereon, and induced thereby, appellee purchased a certain lot in the town of Ashley, to wit: Lots seven and eight in Block 38, Dekalb County, Indiana, and paid to said Indiana Improvement Company therefor \$300, and erected on said lot a building of the value of \$1700, which sum was actually expended in its construction by appellee in reliance upon said several promises and agreements of appellants, and appellee in all respects complied with his part of said agreement; that the railroad company, in violation of its agreements abandoned said point as a division terminal and headquarters, demolished and removed its said roundhouse from said point, and dismantled its shops, and wholly abandoned the said town of Ashley to appellee's damage in the sum of \$1,500.

Some of its averments indicate that the complaint proceeds on the theory that appellee was induced to purchase and improve the lots in question by the fraudulent

1. representations, acts and conduct of the agents and officers of the appellant companies, but when carefully read, it will be seen that it is not sufficient on this

theory. There is no averment that such representations were false or that they were falsely or fraudulently made knowing them to be false or that they were recklessly made not knowing whether they were true; nor is there any averment that they were made for the purpose of cheating and defrauding appellee. *New v. Jackson* (1912), 50 Ind. App. 120, 95 N. E. 328 and authorities there cited.

It also appears that the statements, representations, acts and conduct relied on as the inducement to appellee to purchase and improve the lots in question related to and

2. were representations, statements and conduct with reference to a thing to be done in the future, viz., the location and permanent maintenance of the buildings, etc., at Ashley and were not made with reference to an alleged existing or past fact, and, hence, as averred furnished insufficient ground upon which to predicate fraud. *Bennett v. McIntire* (1889), 121 Ind. 231, 234, 23 N. E. 78, 6 L. R. A. 736, and authorities there cited; *Robinson v. Reinhart* (1894), 137 Ind. 674, 682, 36 N. E. 519; *Smith v. Parker* (1897), 148 Ind. 127, 132, 133, 45 N. E. 770; *Fouty v. Fouty* (1870), 34 Ind. 433, 435, 436; *Burt v. Bowles* (1879), 69 Ind. 1, 6; *Kain v. Rinker* (1891), 1 Ind. App. 86, 89, 27 N. E. 328; *Ayers v. Blevins* (1901), 28 Ind. App. 101, 104, 62 N. E. 305.

We do not mean to be understood as saying or holding that, under the facts pleaded, a complaint might not be so worded as to make it sufficient on such theory. Upon

1. this question we express no opinion. It is sufficient to say that the complaint does not proceed on the theory that the agents and officers of the appellant improvement company, for the purpose of inducing the appellee to purchase and improve the lots in question, *falsely* and *fraudulently* represented that it was *then the intention* of the railroad company to permanently locate its division and the necessary shops and structures at said town of Ashley, and that the said improvement company had in fact made

a contract with the appellant railroad company for the benefit of the purchasers of the lots in said town of Ashley wherein such railroad company had agreed to permanently locate its division buildings, and structures and permanently maintain its division shops, etc., at said town, when in truth and in fact it was *not then the intention* of such railroad company to permanently locate its division shops, structures, etc., at said town, and when in truth and in fact the improvement company *had no such contract or agreement with the railroad company for the permanent location of said division buildings, shops, etc.* Nor is it averred that the railroad company authorized and permitted such statements and representations by the improvement company, knowing them to be false or by its officers and agents made the same or similar statements, knowing them to be false and for the fraudulent purpose of aiding and assisting the improvement company in inducing the appellee and others to purchase and improve lots in said town and to cheat and swindle such purchasers. On the contrary, the complaint proceeds on the theory of a valid binding agreement between the appellants made for the benefit of the purchasers of lots in said town of Ashley, wherein and whereby it was agreed by the railroad company that if the improvement company would sell and convey to it the ground necessary for its buildings for division purposes at the price per acre originally paid by such improvement company, that it would in consideration therefor agree to erect and permanently maintain its buildings, structures, etc., thereon, and that pursuant to this arrangement between the two appellants, the improvement company, sold the lots in question to appellee and with the knowledge, consent and acquiescence of the railroad company, agreed with appellee that the railroad company would permanently maintain its division and necessary shops, buildings, etc., at said town.

Appellee in his brief concedes that the theory of the complaint above indicated "*is one of the theories upon which*

the appellee predicates his right of recovery'', but contends that ''in addition to the right of appellee to recover upon said oral contract'' that the public declarations of the highest officials of the two companies and their acts and conduct made and performed with the knowledge on the part of each, ''that the people were being informed of the existence of said oral contract and were so informed for the purpose of inducing such purchasers to act thereon and purchase lots, created a contract between said companies and such purchasers upon which such purchasers had a right to rely, such declarations, acts and conduct being used with the knowledge of each of said companies as inducements for the sale of such lots to the appellee and others.'' We need not express any opinion as to the correctness of this contention because appellee's position, as will be hereafter disclosed, is not strengthened thereby.

It is not alleged that such contract or that any of the contracts or agreements relied on were in writing, hence they will be presumed to be verbal. *Langford v. Freeman*

3. (1877), 60 Ind. 46, 50; *Krohn v. Bantz* (1879), 68 Ind. 277, 279; *Carlisle v. Brennan* (1879), 67 Ind. 12, 18; *Wolke v. Fleming* (1885), 103 Ind. 105, 106, 2 N. E. 325, 53 Am. Rep. 495.

The jury by its answers to interrogatories expressly found that the promoters or syndicate of the ''Indiana Improvement Company'' a few days before the incorporation of such company entered into a *written agreement* with the appellant Wabash Railroad Company of which the following is a copy:

''St. Louis, Mo., March 17, 1892.

Mr. Chas. M. Hays, General Manager.

Dear Sir:—On behalf of the syndicate formed on the 9th day of Feby. 1892, for the purpose of buying land along the Chicago-Detroit extension of the Wabash Railroad, composed of James F. How, Chas. M. Hays, Gary, Wells H. Blodgett, O. D. Ashley and others. One of the principal objects of the above syndicate is to lay out and plat a townsite at the division point to be

established by the Wabash Railroad Company. The syndicate having secured options on a tract of land lying along said railroad line commencing at the principal street or road, running north and south in the present town of Hudson, thence running east of said street one and a fourth miles.

In consideration of the advantage and profits to be derived by the syndicate in location of the Company's depot, terminals and shops on the grounds above mentioned, I make you the following proposition, subject to the approval of the executive committee: First: We will sell to the Railroad Company whatever ground they may need not to exceed one hundred acres, at the same price we pay, at any time before the townsite is platted; * * *.

Provided, however, that the depot shall be located at least 2,500 feet east of the above mentioned Hudson road (which is on Township line) and that the shops shall be located east of the Depot. Respectively submitted, Theo. Gary, Manager for the Syndicate.

Accepted. The Wabash R. R. Co. By Chas. M. Hays, Gen'l Manager.
March 17, '92."

The jury also found by its answers to interrogatories the following facts: Appellant "Indiana Improvement Company" was incorporated on April 2, 1892. On May 2, 1892, after its incorporation the board of directors of such improvement company in a meeting of such directors approved said contract above set out and made a record of their approval. This was the only contract relating to said matter shown by the records of said improvement company. Pursuant to said contract the improvement company on Aug. 13, 1892, by a deed signed by its president and secretary conveyed and warranted to appellant railroad company 96 and 24/100 acres of land, the consideration expressed in said deed being \$8708.50 which deed was duly recorded on December 10, 1892. Theodore Gary was the manager of said improvement company from sometime in 1892 to sometime in 1896 and as such, after various verbal conversations with appellee entered into a *written contract* with him of which the following is a copy:

“This contract made and entered into this 18th day of January, 1893, by and between the Indiana Improvement Company, the seller, a corporation organized under and by virtue of the laws of the State of Indiana, in that behalf enacted, and George Grate, of the County of Dekalb, State of Indiana, the buyer: *Witnesseth*, that the seller has sold to the buyer, and the buyer has purchased from the seller, the following described real estate situate in the Town of Ashley, County of Dekalb, State of Indiana, to-wit: Lots seven (7) and eight (8), in Block Number Thirty-eight (38) at and for the price and sum of Three Hundred Dollars (\$300.00), to be paid as follows: One Hundred Dollars cash, the receipt of which is hereby acknowledged by the seller, and which is a part of the consideration of the sale, and the balance whereof is payable in the following manner, to-wit: One Hundred Dollars on or before one year after date, and One Hundred Dollars on or before two years after date, as evidenced by two promissory notes of even date herewith, without any relief from valuation or appraisement laws, with interest at the rate of six per cent per annum, the interest payable annually with attorney's fees. The seller agrees to furnish a complete abstract of title to said buyer; the seller also agrees to pay all state, county and special taxes on said property, excepting taxes of every nature assessed after April 1st, 1893, and thereafter, which it is expressly understood and agreed that the buyer, his heirs or assigns shall pay all taxes and assessments of every nature assessed against said real estate after April 1st, 1893; that if not paid said deed shall be subject thereto. The seller agrees to deliver to buyer or order a general warranty deed, properly executed, and free and clear of all taxes and incumbrances down to April 1st, 1893, upon the payment by the buyer, his heirs or assigns of the two notes herein referred to; if the buyer fail to pay all of the notes herein described, or the interest upon the same when it becomes due, he shall forfeit to the seller all sums of money paid as fixed and liquidated damages, and not as a penalty; and upon such default the said buyer, his heirs or assigns, shall have no further right, title or interest in any way whatsoever in and to said described real estate.”

Pursuant to this contract the improvement company on

July 6, 1896, executed to the appellee its warranty deed to the lots in question, the consideration expressed in said deed being \$300. There was never any other written contract between appellee and said improvement company relating to said lots, except said deed and the contract pursuant to which said deed was made, and there was no written contract of any kind between appellee and the railroad company. There was no written contract of any kind between appellee and the railroad company relating to the establishment by said company of its division headquarters, terminal, etc., or erecting its offices, shops, roundhouse or buildings at said town of Ashley and no written contract of any kind with reference to said company either permanently or temporarily maintaining such division headquarters, terminal and buildings at said point. The railroad company about the month of July, 1907, removed from said town of Ashley the division terminal, structures, etc., mentioned in the complaint that were so installed by the railroad company at Ashley in 1892 or 1893, and were by such company maintained there until their removal to Montpelier, Ohio, about July, 1907.

It is earnestly contended by appellants that they were entitled to judgment on said answers to interrogatories. In support of this contention they urge in effect: (1) That such answers affirmatively find that the contracts relied on by appellee as being verbal and on which he bases his right to recover, were in writing, and that having predicated his right of action upon verbal contracts he cannot recover on written contracts. (2) That the written contracts found by the jury to have been entered into, contain no agreement on the part of either of the appellants that the railroad company should *permanently maintain* its division terminal, buildings, etc., at Ashley as alleged in appellee's complaint and hence could not in any event support a judgment in appellee's favor. (3) That, even if it be conceded that appellants had verbally agreed with appellee as alleged in his complaint, and that such agreements were valid and enforce-

able, that the findings of the jury show a substantial compliance therewith according to the reasonable intendment and meaning thereof.

There can be no doubt but that appellee is bound by the averments of his complaint and having alleged an oral contract, he will not be permitted to recover upon proof

4. showing that the contract relied on was in fact in writing. *Lake Shore, etc., R. Co. v. Bennett* (1883), 89 Ind. 457, 461; *Stewart v. Cleveland, etc., R. Co.* (1898), 21 Ind. App. 218, 226, 52 N. E. 89; *Hall v. Pennsylvania Co.* (1883), 90 Ind. 459, 464; *Louisville, etc., R. Co. v. Godman* (1885), 104 Ind. 490, 493, 4 N. E. 163; *Indianapolis, etc., R. Co. v. Forsythe* (1892), 4 Ind. App. 326, 29 N. E. 1138. It is also true that the written contracts offered in evidence, contain no agreement on the part of either of appellants, to the effect that the railroad company would *permanently maintain* its division headquarters, buildings, etc., at the town of Ashley, and hence furnish no support to the vital issue tendered by the complaint.

It is insisted, however, by appellee, in effect, that there is no finding by the jury that there was *no verbal* agreement of the character alleged in his complaint, and that we must therefore assume in favor of the general verdict that such oral agreement was proven. It is a general rule

5. that where a written contract appears to be complete, it is presumed to be the repository of the final intention and agreement of the parties in regard to the subject-matter of such agreement, and that such agreement cannot be changed, modified, added to or subtracted from by proof of any prior or contemporaneous parol agreement. *Carr v. Hayes* (1887), 110 Ind. 408, 414, 11 N. E. 25; *Diven v. Johnson* (1888), 117 Ind. 512, 515, 20 N. E. 428, 3 L. R. A. 308; *Singer Mfg. Co. v. Sults* (1897), 17 Ind. App. 639, 641, 47 N. E. 341; *Stevens v. Flannagan* (1892), 131 Ind. 122, 128, 30 N. E. 898; *Western Pav., etc., Co. v. Citizens St. R. Co.* (1891), 128 Ind. 525, 535, 537, 26 N. E. 188, 25

Am. St. 462; *Conant v. National State Bank* (1889), 121 Ind. 323, 22 N. E. 250; *Pickett v. Green* (1889), 120 Ind. 584, 588, 22 N. E. 737; *Stewart v. Babbs* (1889), 120 Ind. 568, 22 N. E. 770; *Gemmer v. Hunter* (1905), 35 Ind. App. 501, 504, 506, 74 N. E. 586. An exception to the rule just announced prevails with reference to the consideration recited in a deed, or writing of any kind, the general rule in such cases being that "the consideration expressed in an instrument of writing may be varied or contradicted to almost any conceivable extent." *Pickett v. Green, supra*, and cases there cited. However, this rule has its exceptions. In *Pickett v. Green, supra*, the Supreme Court in commenting on this rule and the reason for its existence on page 588 said: "The reason generally given for the rule is that the language with reference to the consideration is not contractual; it is merely by way of recital of a fact, viz., the amount of the consideration, and not an agreement to pay it, and hence such recitals may be contradicted. There is also a rule, so well known that it needs no citation of authority, to the effect that parol testimony cannot be received to vary, contradict, or add to the terms of a written contract; and out of this grows the exception to the rule first above stated, that where the contract is complete upon its face, a stipulation as to the consideration becomes contractual, and where there is either a direct and positive promise to pay the consideration named, or an assumption of an encumbrance on the part of a grantee in a deed which becomes binding upon its acceptance, then the ordinary rules with reference to contracts apply, and the consideration expressed can no more be varied by parol than any other portion of the written contract." See authorities cited. Appellants contend that the contract between appellee and the improvement company pursuant to which the appellee's deed was made, shows the consideration to be contractual in character and hence under the rule above announced, cannot be contra-

dicted or added to, by evidence of an oral agreement showing an additional or different consideration.

Assuming, without deciding, that appellants are in error in this contention and that under the averments of his complaint, appellee might have proven a verbal agreement

6. between himself and the appellants by which they agreed as part of the consideration for his buying the lot in question that the division terminal, buildings, etc., of the railroad company should be permanently located at the town of Ashley, the possibility of such proof, under the issues, would prevent a judgment on the answers to interrogatories, but when we come to consider the motion for a new trial and look to the evidence, we find that no such proof was made. When we look to the evidence we find that the facts found by the jury in its answers to interrogatories are undisputed and we also find that the written contracts above set out were the only contracts either written or verbal shown to have been entered into between appellants themselves or between either of them and appellee. There was some evidence tending to show that some of the officers of the two companies, and especially of the improvement company, had by certain letters, advertisements, statements, and public utterances, represented in effect that the location of said terminal station, buildings, etc., were intended to be permanent, but none of these statements could be said to be contractual in character. They were merely the statements and representations of such officers of what they claimed to be, the then present intention and understanding of such companies, which, if untrue, could at most furnish grounds upon which fraud might be predicated, but they were in no sense of the nature of an agreement or contract intended to obligate or bind such railroad company to so permanently locate such terminal station, buildings, etc., at said point. As to the validity and effect of a contract of the kind herein sued on, whether verbal or written, when

made for the purposes and under the circumstances averred in the complaint, we express no opinion. It is clear that the decision is not supported by sufficient evidence and hence the motion for new trial should have been sustained.

Many other reasons for a reversal of the judgment are presented and argued by appellant with persuasive force and reason, but it is apparent that the conclusion we have reached will necessitate a complete change and reformation of the pleadings, and such questions will not likely arise again. The judgment is reversed with instructions to the court below to grant a new trial, and to permit appellee to amend his complaint if he so desires, and for such further proceedings as may not be inconsistent with this opinion.

NOTE.—Reported in 102 N. E. 155. See, also, under (1) 20 Cyc. 95, 99; (2) 20 Cyc. 20; (3) 9 Cyc. 715; (4) 9 Cyc. 753; (5) 17 Cyc. 596, 648; (6) 33 Cyc. 115. As to knowledge by defendant of falsity of representation and his intent to deceive plaintiff as essential grounds of action for fraud, see 18 Am. St. 559. As to admissibility of parol evidence to vary writing in respect of the consideration, see 56 Am. St. 664. On the question of statements regarding future as a fraud, see 35 L. R. A. 420, 437.

GUYNN v. DAUGHERTY.

[No. 8,043. Filed June 19, 1913.]

1. **APPEAL.—Review.—Ruling on Motion to Make Complaint More Specific.**—Where a complaint to recover on a written agreement for the payment of a certain sum, alleged that the consideration therefor was the payee's agreement to dismiss certain actions which he had pending against defendant and to permit judgment by default in a proceeding to set aside the probate of a certain will, and alleged generally that such payee had performed his part of the agreement, the overruling of a motion to make such complaint more specific by stating the titles of the actions and whether such causes as were agreed upon were in fact dismissed was not erroneous. p. 603.
2. **CONTRACTS.—Actions.—Complaint.—Sufficiency.**—A complaint by the assignee of a written agreement for the payment of certain money to be derived from the sale of certain property, to recover on an amount alleged to be due thereon, setting forth the agree-

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ment and the assignment thereof, alleging the consideration for its execution to be the dismissal of certain pending actions and payee's agreement to permit judgment by default in a certain proceeding, and alleging generally the payee's performance of his part of the agreement, that defendant had sold the property and that a certain amount was still due from defendant out of the proceeds thereof, was sufficient to withstand a demurrer. p. 603.

3. **APPEAL.—Review.—Harmless Error.—Ruling on Demurrer to Answer.**—Sustaining a demurrer to a paragraph of answer, the material allegations of which were provable under other paragraphs, was not erroneous. p. 603.
4. **INTEREST.—Right to Recover.—Review on Appeal.**—Where there has been a vexatious delay in the payment of an amount due, interest may be charged from the date when due, so that in an action for the recovery of a sum alleged to be due plaintiff, where there was some evidence warranting the trial court in finding that there had been vexatious delay, its action in allowing interest will not be disturbed on appeal. p. 604.
5. **APPEAL.—Review.—Verdict.—Evidence.**—The court on appeal will not disturb the judgment of the lower court on the weight of the evidence. p. 605.

From Grant Circuit Court; *Henry J. Paulus*, Judge.

Action by Lawrence L. Daugherty against Katheryne M. Guynn. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

D. F. Brooks, for appellant.

Warren G. Sayre and *Nelson G. Hunter*, for appellee.

SHEA, J.—Action by appellee against appellant, Katheryne M. Guynn, on a contract whereby she agreed to give William A. Newman a portion of money to be collected by her from the sale of certain hotel furnishings. The contract was assigned by Newman to appellee. The complaint in substance alleges that on March 12, 1908, appellant entered into the following contract:

“For value received, I hereby agree to give William A. Newman the first money collected to the amount of \$3,000.00 on the sale of the Tremont Hotel furnishings, and after I have received \$3300 therefrom, the balance shall be equally divided between the parties hereto as collected. It is further agreed that in case of the sale of the power house equipment the net receipts there-

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from shall be equally divided as collected. In witness whereof we have hereunto set our hands in duplicate this 12th day of March, 1908.

(Signed) Katheryne M. Guynn (Signed) William A. Newman.”

that the consideration for this contract was that Newman would dismiss certain suits he had pending against her in the Wabash Circuit Court, one by William A. Newman v. Katheryne Guynn to dissolve a partnership between them and for an accounting, one to require appellant's husband to file an inventory and give additional bond as administrator of the estate of Mary A. Newman, and one to recover certain real estate and insurance money and also to allow a default to be taken against him in said court in a suit to set aside the probate of the will of Mary A. Newman, and to make proof of a subsequent will; that he would refrain from bringing certain other suits against her, and consent to the sale of the property described in the agreement, all of which Newman did; that on the same day appellant sold the Tremont Hotel furnishings for \$10,000, \$3,000 of which she received on account of the sale; that Newman was entitled to recover the first \$3,000 received by appellant, and half of the residue, or \$1850, \$2500 of which is due and unpaid, for which this action is brought. Appellant has paid Newman on said account \$500, and he has made demand for the residue, but payment has been refused; that on or about July 1, 1909, William A. Newman, for value, sold and assigned the contract to appellee by writing on the back thereof “For value received I hereby assign this contract to Lawrence L. Daugherty, June 22, 1909. William A. Newman”. That on the same day he also assigned the contract to appellee in writing as follows:

“For value received, I hereby assign, transfer and make over to Lawrence L. Daugherty, of Wabash, Indiana, the contract to which this is attached (being the contract sued on) as an assignment thereof and all avails thereof for himself and as trustee * * * And said Daugherty is hereby authorized and empow-

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ered to collect whatever is due and all that is to become due under said contract by suit or otherwise in his own name * * *. Done at Wabash, Indiana, this 22nd day of June 1909. William A. Newman.”

That there is due appellee under the contract the sum of \$2500, and interest for a year and a half, which is wholly unpaid, and for which amount judgment is demanded.

Appellant's motion to make the complaint more specific was overruled, and an answer in four paragraphs was then filed, the first a general denial. The second avers, in substance that appellant admits the execution of the contract sued on, but says after making it, Newman, instead of allowing default to be taken in the case of Katheryne M. Guynn v. William Newman *et al.* described in the complaint, did allow the default to be taken, but on the same day after the proof had been heard procured his attorney to request the court not to render judgment in the case until further notice. The court, upon this request withheld its decision authorizing the will for the probate of which suit was brought, to be probated, and while the decision was held in abeyance, one Harry Newman began a suit to resist the probate of the will; that the will is not yet probated and the suit still pending; that Harry Newman was unable to give bond to set aside the probate of the will, and if same had been allowed to be probated as agreed upon, the suit to resist the probate would not have been brought, all of which facts were well known to William A. Newman; that by reason of these facts, and the conduct of said William, appellant has been compelled to defend the suit at an expense of \$500; that as a part of the contract sued on, and the consideration therefor, William A. Newman agreed to assist her in every way in his power to perfect her title to certain property in Wabash County given her under the will and a deed from her mother Mary A. Newman, and to make an amicable settlement of her mother's estate, but, in violation of his promise, he immediately set to work to defeat this result, and had Harry Newman bring suit in the Wa-

bash Circuit Court asking to have set aside a deed of conveyance from Mary A. Newman to appellant for 108 acres of land in said county, and also bring two other suits against her for the purpose of antagonizing her; that she was compelled to defend these suits at an expense of \$1,000, in addition to the \$500 spent in defending the suit to resist the probate of the will, which sums she asks may be recouped against William A. Newman and found due her. The third paragraph avers that she collected, pursuant to the contract sued on, \$6,022.69, and paid William Newman \$500 in cash; that by a subsequent oral agreement between her and said William, and before the assignment of the contract to appellee, it was agreed that out of the money collected under the contract certain bills, (which are set out) owing by appellant and William A. Newman jointly, and by Newman himself, were to be paid; that it was further agreed between them that one-half of the proceeds from the sale of the saloon and the furniture and fixtures in the sum of \$500, might be retained by Newman, making a total paid to him of \$2,038.17; that certain other indebtedness of said William should be paid out of the funds arising from the sale of the property, (setting out the amounts,) and copy of a contract to this effect is made a part of this paragraph of answer by exhibit; that appellant has made all these payments and stands ready to abide the order of the court and pay all the residue of the money in her hands belonging to said Newman or his grantee by the contract sued on whenever the court may direct; that there was nothing due appellee at the time of the commencement of this action, and she asks judgment for costs. The fourth paragraph avers full payment by appellant to appellee's grantor of all money collected under the contract sued on, before the same was assigned and suit brought.

Appellee filed demurrers to the second and third paragraphs of appellant's answers, which the court sustained

as to the second and overruled as to the third. Appellee then replied in general denial to the third and fourth paragraphs of answer, and also filed two affirmative paragraphs of reply to the third. The issues formed were submitted to the court for trial. After hearing the evidence, the court rendered judgment in favor of appellee for \$2,825.

The first error assigned and argued is that the

1. motion to make the complaint more specific should have been sustained for the following reasons: (1) That plaintiff (appellee) be required to state in his complaint the title of the suits in the Wabash Circuit Court that were to be dismissed by him. (2) The title of the case in which William A. Newman was to suffer a default. (3) Whether Newman did dismiss such causes as were agreed upon and abandon such claims. The complaint alleges a substantial compliance with the contract. The acts to be performed by Newman are sufficiently set out, and it is alleged generally that he performed all his part of the agreement. This, we think, was sufficient for the purposes of the question involved, and therefore no error was committed in overruling the motion to make the complaint more specific. The next error assigned is the

2. overruling of appellant's demurrer to the complaint.

The complaint contains all the essential allegations, and no error was committed in overruling the demurrer thereto. Appellant also assigns that the court erred in sustaining appellee's demurrer to her second paragraph of answer to the complaint. The theory of the second

3. paragraph of answer, from the allegations contained therein, is difficult to define. It is, however, the judgment of the court that all the material allegations contained therein might have been heard under the other paragraphs of answer filed, and no error was committed by the court in sustaining the demurrer thereto. *Cloverdale v. Edwards* (1900), 155 Ind. 374, 58 N. E. 495; *Metzger v.*

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Hubbard (1899), 153 Ind. 189, 54 N. E. 761; *Hardison v. Mann* (1898), 20 Ind. App. 404, 50 N. E. 899; *Larned v. Maloney* (1898), 19 Ind. App. 199, 49 N. E. 278.

Appellant's learned counsel states that the vital question involved in the issues here is raised by the fourth assignment of error, which is the overruling of the motion for a new trial, in support of which eight reasons are assigned. The first and second are that the judgment of the court is contrary to law, and not sustained by sufficient evidence. The fourth, seventh and eighth reasons question the ruling of the court in admitting in evidence over appellant's objection the contract sued on between appellant and William A. Newman. The fifth and sixth causes are especially referred to by counsel in argument. The fifth is that the damages assessed by the court are excessive, and the sixth that the amount of recovery is erroneous, being too large. The

argument upon the fifth and sixth assignments is

4. based wholly upon the fact that the court allowed interest upon the debt from date of the contract. It is earnestly urged by appellant's counsel that no interest could be allowed except where there is a special agreement to pay, or where there has been a demand for payment and a refusal, citing authorities sustaining these propositions. The rule has been thoroughly settled in this State by the Supreme Court that where there has been a vexatious delay in the payment of an amount due, interest may be charged from the date when due. *Rogers v. West* (1857), 9 Ind. 400; *Killian v. Eigenmann* (1877), 57 Ind. 480; *Hazzard v. Duke* (1878), 64 Ind. 220. From an examination of the evidence we are of the opinion that the court was warranted in finding there had been a vexatious delay in the payment of the amount of this claim, and therefore this court will not disturb the judgment of the lower court upon this question.

There was some evidence heard by the court upon every material point involved in this case. Under the familiar

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rule, this court will not disturb the judgment of the lower court upon the weight of the evidence. No error was committed in the introduction of the contract in evidence.

Judgment affirmed.

NOTE.—Reported in 102 N. E. 147. See, also, under (1) 9 Cyc. 714, 728; (2) 9 Cyc. 722, 728; (3) 31 Cyc. 358; (4) 22 Cyc. 1498; (5) 3 Cyc. 348. As to full performance by plaintiff as condition precedent to right of action, see 59 Am. St. 282.

HENRY v. FRAZIER ET AL.

[No. 7,839. Filed February 13, 1913. Rehearing denied June 19, 1913.]

1. NEW TRIAL.—*New Trial as of Right.—When Not Allowed.*—Where two or more substantive causes of action proceed to judgment in the same case, in one of which a new trial as of right may be granted, but the other not, the latter will control the procedure, and a new trial as of right will be denied. p. 610.
2. NEW TRIAL.—*New Trial as of Right.—Title to Real Estate.*—In an action involving title to real estate and to set aside a conveyance thereof, a new trial as of right may be had under §1110 Burns 1908, §1064 R. S. 1881. p. 610.
3. NEW TRIAL.—*New Trial as of Right.—When Not Allowed.*—Where one paragraph of complaint involved the title to real estate and sought to set aside a conveyance of the same, and other paragraphs alleged the breach of a contract for care and support for which plaintiff asked damages, and that certain expenditures had been made which plaintiff sought to have declared a specific lien against the real estate in question, a new trial as of right was properly denied. p. 610.

From Clinton Circuit Court; *Joseph Combs*, Judge.

Action by John H. Henry against Luley C. Frazier and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

O. E. Brumbaugh and *J. Claybaugh*, for appellant.

Joseph P. Gray, *Thomas M. Ryan* and *James V. Kent*, for appellees.

SHEA, J.—This was an action by appellant against appellees. The complaint was in four paragraphs. The first involves the title to certain real estate in Clinton County, Indiana, and seeks to have a deed executed by appellant to Luley C. Frazier set aside. The second alleges a contract for care and support between appellant and Luley C. Frazier, as consideration for the conveyance of the real estate described, and a breach of the contract by said Luley C. Frazier, alleging damages on account of such breach, asking for judgment and that certain sums claimed to have been expended by him be declared a specific lien on the real estate in question. The third paragraph is substantially the same as the second, except more elaborate in its statement of detail, alleging the payment of certain sums of money for taxes, repairs, mortgage debt, etc., asking for an accounting and that the amount due be declared a lien on said real estate, that said lien be foreclosed and said premises sold in satisfaction thereof, etc. The fourth paragraph is not clear in its theory, and in view of the conclusion we have reached, it is not important. Demurrers to the third and fourth paragraphs were overruled. Appellees answered by a general denial to each paragraph. Cross-complaint in ejectment in two paragraphs by appellee Luley C. Frazier, which appellant answered by a general denial. Trial by the court, finding and judgment for appellees on the issues joined on the complaint, and for appellee Luley C. Frazier on the issue joined on the cross-complaint. Appellant's motion for a new trial as of right was overruled, and this ruling is the only error assigned. It is insisted by appellant that under §1110 Burns 1908, §1064 R. S. 1881, he is entitled to a new trial as of right. This section reads as follows: "The court rendering the judgment, on application made within one year thereafter by the party against whom judgment is rendered, his heirs, assigns, or representatives, and on the applicant giving an undertaking, with surety to be approved by the court or

clerk, that he will pay all costs and damages which shall be recovered against him in the action, shall vacate the judgment and grant a new trial. The court shall grant but one new trial under the provisions of this section.” If it is shown by the record that appellant’s cause is within this section of the statute, he is entitled to a new trial as of right.

Appellees insist that the record does not show that a sufficient bond or any bond was filed, and that inasmuch as the statute requires the filing of a bond, it must be disclosed by the record, else this court will not disturb the ruling of the lower court, citing *Carpenter v. Willard Library* (1901), 26 Ind. App. 619, 622, 60 N. E. 365; §1110, *supra*. We are inclined to think this is a correct construction of the law, but prefer to pass upon the merits of this case. Appellees contend that appellant has stated in his complaint two or more substantive causes of action, which proceeded to judgment, and that the second and third paragraph of complaint are based on matters for which a new trial as of right cannot be allowed. It is undisputed that the first paragraph of the complaint involves the title to real estate, and under it appellant was entitled to a new trial as of right. Looking to the second paragraph, it appears, in substance, that on March 8, 1902, appellant, an unmarried man, by his quitclaim deed released and quitclaimed to appellee Luley C. Frazier real estate in Clinton County described therein. The consideration named was \$500, but in truth and in fact no consideration in money was paid. Appellant claims to have been the owner of said real estate at the time of the conveyance, and for a long time prior thereto. It is alleged that Luley C. Frazier, in consideration of said release and quitclaim, agreed that appellant should continue to live on said real estate, and have his home in the dwelling house thereon; that she would board him, do his cooking and housekeeping, and provide and care for him for and during his natural life. This agreement

was carried out until the —— day of February 1909, at which time appellee Luley C. Frazier forbade appellant the right to enter upon said real estate, and refused and wholly failed to cook, provide, care for or keep house for him, and in all things wholly failed to keep her promise and agreement, in consideration of which appellant had executed the release and quitclaim deed; that appellant demanded that she carry out and perform her agreement, which she wholly failed, refused and neglected to do; that since the execution of the deed, Luley C. Frazier became and is now indebted to appellant by reason of her failure to perform her promise and agreement, and for money paid for her use and benefit, and for the use and benefit of said property, for taxes on said real estate, for mortgage debt and interest paid thereon, and for necessary and permanent repairs and improvements on said real estate, in a large sum of money, which appellant asks to have adjudged a valid and subsisting lien upon the real estate in question. It is averred that Jesse W. Frazier is the husband of Luley C. Frazier, and for that reason made a party defendant. The prayer of this paragraph of complaint is as follows: "Wherefore, the plaintiff demands judgment against the defendant Luley C. Frazier, for the full amount found due him, as herein set forth and alleged, that the same be declared and adjudged a valid and subsisting lien and the amount of said lien enforced by execution and sale of said real estate and for all proper relief."

The third paragraph alleges substantially the same facts as the second, except more in detail. In addition, it is alleged, in substance, that prior to and at the time of the conveyance Luley C. Frazier was wholly insolvent, and from then until the breach of the contract, was without means and failed and neglected to pay certain liens, charges, and indebtedness against said real estate, including taxes, principal and interest of a mortgage debt, and the cost of necessary repairs and improvements made thereon; that appel-

lant was entitled to have his home with Luley C. Frazier on said real estate, and under the contract had an equity therein, and a right to his living and subsistence therefrom during his natural life, by reason of which he was interested in the possession of same, and in saving and protecting it from execution and sale to satisfy said liens and indebtedness. On account of the inability and failure of Luley C. Frazier to pay said items of indebtedness, appellant was compelled to and did pay same to save and protect his home and his rights and equity in the real estate, and for the use and benefit of Luley C. Frazier. The items are set out in detail, including taxes from the date of conveyance; cost of necessary repairs and improvements; amount of a mortgage debt and interest, on the real estate, for which Luley C. Frazier was liable, and which she had assumed and agreed to pay; the reasonable value of appellant's care and support since the breach of contract and during his expectancy of life, and the amount of the benefits, rents and profits received by Luley C. Frazier since the date of conveyance, for all of which she is indebted to appellant. That by reason of her failure and refusal to carry out her contract, the consideration for said conveyance has wholly failed and been lost to appellant, whereby he has been greatly damaged. By reason of these facts appellant is entitled to have an accounting, and to have the items of indebtedness ascertained and charged against Luley C. Frazier, and all his damages determined and adjudged a "valid and subsisting lien against said real estate, and the same enforced and foreclosed and said real estate subjected to execution and sale to pay off and satisfy the same." Appellant "demands judgment for thirty-five hundred dollars (\$3,500) against the defendant Luley C. Frazier, that the same be established and adjudged as a valid and subsisting lien against the real estate hereinbefore described, the same subjected to execution and sale, and the same sold to pay off and satisfy said damages and for all proper relief."

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By the decisions of both this court and the Supreme Court, we think it is settled that if two or more substantive causes of action proceed to judgment in the same case, one being of a class in which a new trial as of right may be granted, but the other not, the latter will control the procedure, and a new trial as of right will be denied. *Bennett v. Closson* (1894), 138 Ind. 542, 38 N. E. 46; *Nutter v. Hendricks* (1898), 150 Ind. 605, 50 N. E. 748; *Schlichter v. Taylor* (1903), 31 Ind. App. 164, 67 N. E. 556; *Wilson v. Brookshire* (1891), 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792; *Norris v. Kendall* (1911), 48 Ind. App. 304, 93 N. E. 1087; *Larrance v. Lewis* (1912), 51 Ind. App. 1, 98 N. E. 892; *Butler University v. Conard* (1884), 94 Ind. 353; *Richwine v. Presbyterian Church* (1893), 135 Ind. 80, 34 N. E. 737.

It is clear in this case that under the first paragraph of the complaint appellant was entitled to a new trial as of right. It is likewise clearly true that a new trial as of right cannot be granted as to a part of the issues, but must be granted or refused as to all. The second and third paragraphs of the complaint in this case did not bring appellant's cause within the provisions of the statute entitling him to a new trial as of right. *Nutter v. Hendricks*, *supra*; *Seisler v. Smith* (1898), 150 Ind. 88, 46 N. E. 993; *Bennett v. Closson*, *supra*; *Cambridge Lodge, etc. v. Routh* (1904), 163 Ind. 1, 71 N. E. 148. This is true, even though, as in this case, appellee files a cross-complaint in ejectment. *Butler University v. Conard*, *supra*; *Williams v. Thames Loan, etc., Co.* (1886), 105 Ind. 420, 5 N. E. 17; *Sterne v. Vert* (1887), 111 Ind. 408, 12 N. E. 719; *Rariden v. Rariden* (1891), 129 Ind. 288, 28 N. E. 701. In the case of *Williams v. Thames Loan, etc., Co.*, *supra*, the court says, speaking of the facts in that case: "The court erred in granting the new trial as of right. Where it affirmatively and decisively appears that an action is to enforce a lien, a new trial as of right cannot be granted. *Jenkins v.*

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Corwin [1876], 55 Ind. 21; *Butler University v. Conard* [1884], 94 Ind. 353." It clearly appearing in this case that the second and third paragraphs of complaint were for the enforcement of a lien, no error was committed by the trial court in overruling the motion for a new trial as of right.

Judgment affirmed.

NOTE.—Reported in 100 N. E. 770. See, also, under (1, 8) 29 Cyc. 1037; (2) 29 Cyc. 1035.

GILBERT v. THE FIRST NATIONAL BANK OF TIPTON.

[No. 7,892. Filed April 4, 1913. Rehearing denied June 19, 1913.]

1. PLEADING.—*Set-off*.—*Sufficiency*.—In an action by a broker for commissions for the sale of certain canned goods, an answer by way of set-off alleging that plaintiff came into possession of a carload of canned goods belonging to defendant and sold the same for a certain sum, which he failed to pay over to defendant, and asking that such sum be set off against any amount found due plaintiff and for judgment for the excess, was sufficient as against a demurrer. p. 613.
2. ASSIGNMENTS.—*Property Included*.—*Evidence*.—*Right of Broker to Proceeds of Sale in Payment of Commissions Due from Assignor*.—Where two canning factories were operated nominally as two companies, but by a single management, and to secure an indebtedness for money loaned in the name of the first company for the use of both factories an assignment of all the property of the first company, including all canned corn owned by it, was executed, and in an action subsequently brought by a broker against the assignee to recover commissions due from it, the evidence, though showing that the first company did not can corn, showed that the assignment was intended to transfer the property of both companies to defendant, a finding that the assignment included the corn canned by the second company was warranted, so that, as against the set-off of defendant, plaintiff was not entitled to retain the proceeds from the sale of a car of such corn in payment of commissions due to him from defendant's assignor. p. 613.
3. SALES.—*Delivery*.—Where personal property is sold for a valuable and fair consideration, the sale is complete between the parties without an actual delivery. p. 617.
4. SALES.—*Intent of Parties*.—*Rights of Creditors*.—A corporation, though indebted to a broker for commissions earned in selling its goods, may sell its property to a bank in satisfaction of

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loans, and in the absence of a fraudulent intent such sale will stand notwithstanding it operates to the disadvantage of such broker in the collection of such commissions. p. 617.

5. **ESTOPPEL.—Inconsistent Claims.—Set-off.—Evidence.**—Under evidence showing that plaintiff performed services for two canning factories, which, though under one management, were operated nominally as two companies, and that plaintiff's account ran against the first company, would warrant a conclusion that plaintiff was not in a position to assert a right to retain the proceeds of a car of corn, canned by the second company, in payment of commissions earned on sales made for the management of such factories, and at the same time deny defendant's right to the proceeds of such corn under an assignment made in the name of the first company on the theory that such assignment did not include the property of the second company. p. 617.
6. **APPEAL.—Review.—Presumptions.**—On appeal the presumptions are in favor of the trial court. p. 618.
7. **ASSIGNMENTS.—Evidence.—Admissibility.**—Where two factories were operated nominally as two companies, though by a single management, and the first company assigned its entire property, and under the evidence the conclusion that the assignment included the property of both companies was warranted, the admission in evidence of a subsequent assignment, incomplete on its face, and signed by the individual who managed both companies, and including property of the second company, was not erroneous. p. 618.

From Tipton Circuit Court; *Leroy B. Nash*, Judge.

Action by Harry C. Gilbert against The First National Bank of Tipton, Indiana. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Holtzman & Coleman and *E. A. Mock*, for appellant.

Edward Daniels and *J. R. Coleman*, for appellee.

FELT, P. J.—This is a suit by appellant, to recover from appellee a commission for the sale of canned goods. The complaint is in one paragraph, which appellee answered by general denial and a seventh paragraph by way of set off, to which appellant demurred for insufficiency of facts. The demurrer was overruled and an exception reserved. The court found for appellee and rendered judgment against appellant, in the sum of \$151.45. Appellant's motion for a new trial was overruled and this appeal taken.

Appellant assigns error in the overruling of said demurrer and the overruling of his motion for a new trial. The complaint avers in substance that appellant is a broker and had sold goods on commission for the Windfall Canning Company; that on August 20, 1909, appellee took over the business of said company and employed appellant to sell the product of said canning company and agreed to pay appellant a commission of three per cent on all sales made by him; that appellant made sales in pursuance of said employment and there is due him as commission therefor the sum of \$960.94 which amount is unpaid. A bill of particulars showing the sales, was filed with and made a part of the complaint. The seventh paragraph of answer

1. alleges in substance that appellant came into possession of one carload of sweet corn consisting of 995 cases of cans each belonging to appellee; that he sold the same for \$1,200 and appellee was entitled to the money; that appellant failed to pay the same or any part thereof to appellee; that the amount is due and unpaid. Prayer that said sum be set off against any amount found due appellant and that appellee have judgment for the excess due it from appellant on account thereof. The seventh paragraph of answer states facts sufficient to constitute a good answer of set-off and the court did not err in overruling the demurrer thereto.

A new trial was asked on the ground that the assessment of the amount of recovery was erroneous, being too large; that the decision of the court is contrary to law and is not sustained by sufficient evidence; error in the admission of certain evidence.

It is not disputed that appellant earned the commission for which he sues, but appellee contends that it was entitled to the proceeds from the sale of the car of corn as set out in its seventh paragraph of answer; that appellant was paid by retaining the proceeds of said sale and owes the appellee the difference between the amount

so received and the commissions due him. The finding of the court was in accordance with the contention of the appellee, so that the real controversy between the parties is to be determined by the answer to the question whether appellee was entitled to the proceeds from the sale of the car of canned corn. Appellant contends and it is not disputed that the Windfall Canning Company owed him between eleven and twelve hundred dollars for commissions earned before the transaction in controversy took place. Appellant further contends that the carload of corn sold by him was not included in the assignment of property made by the Windfall Canning Company to the appellee and asserts that the same belonged to the Warsaw Canning Company. Appellant in his brief states: "The undisputed facts in this case are that William A. Bowlin was the owner of both the Windfall Canning factory and the Warsaw Canning factory." It also appears that the business of said companies was under one management; that Bowlin procured money from appellee which he used in the operation of both of said plants; that he became indebted to the appellee and on June 19, 1909, executed an instrument which read as follows:

"State of Indiana, County of Tipton, SS: The Windfall Canning Company hereby bargains and sells to the First National Bank of Tipton, Indiana, the following described property, to-wit: All of the personal property of all kinds and character belonging to said Windfall Canning Company, said personal property consisting of all packages, canned goods, boxes, barrels, cans, caps, vegetables, fruits, pulp, corn and stock manufactured or in process of manufacture, and all materials used in the business of said Company owned or held by it in trust or on commission or sold but not removed, or in cars on the sidetracks adjacent to said Canning Company property, situate in the town of Windfall City, Indiana, and all of said kinds of property above described of said Canning Company may become in possession of during the year, 1909. Said Bill of Sale is hereby made in payment of \$27,500 indebtedness shown due and owing by said Windfall Can-

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ning Company to the said First National Bank. Witness our hands and seals this 19th day of June, 1909.

The Windfall Canning Company. By W. A. Bowlin, President. (Seal)''

Bowlin continued to manage the business of said company for appellee, and was required to turn over to it all the proceeds of the sales of goods. On August 19, 1909, one John S. Mitchell was by the appellee placed in charge of the business of said company and on August 30, 1909, at the suggestion of said Mitchell, said Bowlin executed another instrument as follows:

''Windfall, Indiana.

For value received, I hereby assign all my rights, title and interest in the canned goods owned by me consisting of about nine hundred cases of peas stored at the Warsaw Canning Factory, Warsaw, Indiana, and nine hundred and ninety five cases of corn stored at the Coburn Warehouse, Indianapolis, Indiana, shipped from Cleveland, Ohio. Said assignment of canned goods to be handled in the same manner as the canned goods now on hand at the Windfall Canning Company. W. A. Bowlin.''

It is not disputed that the carload of corn was packed by the Warsaw Canning Company and that the Windfall factory did not can corn and was not equipped for so doing. It is asserted by appellant that the appellee has no claim to the car of corn except that given by the instrument of date August 30, 1909; that the instrument is incomplete and defective in form and was not delivered to appellee by Bowlin, but was held by said Mitchell; that the car of corn was sold prior to August 30, and the proceeds rightfully applied by him to the payment of the indebtedness due him from said Windfall Canning Company. The car of corn was shipped to Cleveland, Ohio, prior to June 19, 1909, and was rejected and from there was shipped to the Coburn Warehouse, Indianapolis, Indiana, where it arrived prior to August 20, 1909. On August 23, appellant wrote to the Windfall Canning Company reporting the condition of the

corn and recommending that it be sold at a reduced price if necessary to make a quick sale and in the letter said: "Please let me hear from you on this." On the same day he wrote the Windfall company for an order to enable him to obtain a release of the car so he could make delivery of corn sold from it to customers. It also appeared that appellant credited the account of the Windfall company on September 2, with \$73.88 and on Sept. 8, with \$1,068.18, but he claimed the sales were made at an earlier date; that all the business with appellant was done in the name of, and through, the Windfall Canning Company. There was evidence other than the written instruments tending to prove that the bill of sale of June 19, was intended to transfer to appellee all the goods and wares of the Windfall Canning Company or of the Warsaw Canning Company; there was also evidence tending to prove that the corn was shipped from Cleveland to Indianapolis, at the direction of appellee through Mr. Bowlin and that the appellee was to receive the proceeds from its sale in pursuance of the transfer of property previously made. On the facts of this case, we think the court was warranted in holding that the legal effect of the instrument of June 19 was to transfer to appellee the car of corn in question as of that date. The car was then at Cleveland, Ohio, and was later shipped to Indianapolis for sale. No corn was canned at the Windfall plant, but the bill of sale expressly includes corn. The terms of the instrument evidence an absolute and unconditional sale of the goods and wares of the Windfall Canning Company to appellee in payment of a debt of \$27,500. The evidence also tends to show that the Warsaw company was only a branch of the Windfall company; that Bowlin obtained credit from appellee for the Windfall Canning Company and used the money in the operation of both plants. He seems to have been the controlling factor in all the business of both concerns, but the evidence is not clear or defi-

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nite as to the nature of the concern known as the Warsaw Canning Company, or as to its business transactions.

Where personal property is sold for a valuable

3. and fair consideration, the sale is complete between the parties without an actual delivery. *Warner v. Warner* (1903), 30 Ind. App. 578, 582, 66 N. E. 760; *Teague v. Abbott* (1912), 51 Ind. App. 604, 100 N. E. 27; 6 Cyc. 990, *et seq.*

Since there is no claim of fraudulent intent the

4. Windfall company could make such sale, though it may have had the effect of putting appellant to a disadvantage in the collection of his claim for commissions already earned. *Owens v. Gascho* (1900), 154 Ind. 225, 228, 56 N. E. 224; *South Branch Lumber Co. v. Stearns* (1891), 2 Ind. App. 7, 11, 28 N. E. 117.

There was evidence from which the court could

5. find that appellee was the owner of all the property covered by the first bill of sale from the date of the instrument, and appellant is not thereby placed in any worse situation than he would have been had the goods been sold at Cleveland as originally intended, and the proceeds remitted to the owner. After the execution of said bill of sale Bowlin was to turn into the bank all proceeds from the sale of goods. He was continued as manager until August 19, 1909, when he was succeeded by Mr. Mitchell by the appointment of appellee. Appellant about August 20, 1909, made a new arrangement with appellee to continue as agent or broker for the sale of the canned goods controlled by it, and there is other evidence tending to prove that he knew of the assignment to appellee and of its claim to the proceeds of all sales prior to that date. His account was against the Windfall Canning Company and both he and appellee are claiming the proceeds from the sale of the car of corn and asking that it be applied on indebtedness against that company. Both parties are therefore in the same situa-

tion in claiming that the funds derived from the sale of the corn should be applied to the payment of the debts of the Windfall company. But this position is inconsistent with appellant's contention that the bill of sale by the Windfall company did not transfer to appellee the car of corn. The court may have concluded from the evidence that appellant was not in a position to deny the transfer to appellee, or that the Warsaw company, notwithstanding it used a different name was in fact only a branch of the Windfall company and did not have such title to its products as to prevent the bill of sale by the Windfall company from transferring to appellee the car of corn in controversy. The evidence as to the names of the concerns, the ownership of the property, the business methods and Bowlin's interest in and control of the concerns is confusing and gives a wide range for inferences to be drawn from the evidence.

6. The presumption is in favor of the trial court. From the record we cannot say its judgment is not sustained by the evidence. Our view of the effect of the bill of sale of June 19, makes the execution of the instru-

7. ment of August 30, unimportant. However, we think there was no error in receiving it in evidence and considering it along with the other facts of the case.

There is no available error shown by the record.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 395. See, also, under (1) 31 Cyc. 226; (2) 4 Cyc. 67; (3) 35 Cyc. 302; (4) 20 Cyc. 572; (5) 16 Cyc. 785; (6) 3 Cyc. 310; (7) 4 Cyc. 111. As to the scope and office of a counterclaim under the code, see note to *Woodruff v. Garner* (Ind.), 89 Am. Dec. 482. As to acceptance and delivery of goods which will satisfy the law of sales, see 49 Am. Dec. 325; 37 Am. Rep. 16; 96 Am. St. 215.

**KELLY ATKINSON CONSTRUCTION COMPANY v.
MUNSON, ADMINISTRATRIX.**

[No. 7,852. Filed April 15, 1913. Rehearing denied June 19, 1913.]

1. **PLEADING.—*Complaint.—Demurrer.—Admissions.***—A demurrer to a complaint admits that all facts well pleaded are true. p. 623.
2. **MASTER AND SERVANT.—*Injuries to Servant.—Unsafe Machinery.—Negligence of Fellow Servant.—Complaint.***—A complaint in an action for personal injuries to an employe is not insufficient on the theory that the injury was caused by the negligence of a fellow servant, where it appears from its averments that the injury was caused by the combined negligence of the master in supplying unsafe machinery and of a fellow servant in the operation of the same, since the master is relieved from liability only when he has exercised reasonable care and prudence in supplying safe machinery and the injury occurs solely through the negligence of the fellow servant. p. 623.
3. **MASTER AND SERVANT.—*Injuries to Servant.—Unsafe Machinery.—Complaint.—Sufficiency.***—A complaint to recover for the death of one employed in elevating a railroad track, by the slipping of a derrick cable from the drum while a heavy girder was being put in place, alleging that the cable was not safely and properly attached to the drum and was not of sufficient length to safely perform the work for which it was used, of which defendant had knowledge and of which plaintiff was ignorant, and that defendant's superintendent ordered the starting of the engine when the cable was unwound from the drum, charged actionable negligence on the part of defendant and was sufficient to withstand a demurrer. p. 624.
4. **MASTER AND SERVANT.—*Injuries to Servant.—Negligence of Fellow Servant.—Evidence.***—In an action for the death of an employe engaged in track elevation work, by the slipping of a derrick cable from the drum while a heavy girder was being placed, evidence which, though showing that decedent and the engineer who operated the derrick engine had previously worked with such derrick, also shows that they had no knowledge of the defective method in which the cable was attached to the drum and had no opportunity of learning that it was defectively attached or that it was of insufficient length to properly handle such girder, affords no support to defendant's theory that the engineer, who was operating pursuant to signals from the superintendent, was, in operating the engine when the cable had been unwound from the drum, guilty of the negligence which caused the death. p. 624.

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5. **MASTER AND SERVANT.—Injuries to Servant.—Defective Appliances.—Evidence.—Sufficiency.**—In an action for the death of a servant by the slipping of a derrick cable from the drum while a heavy iron girder was being placed, evidence showing that the cable was defectively attached to the drum and was of insufficient length to properly handle such girder, and that such cable and its fastening to the drum had not been inspected during eighteen months previous to the injury, and also showing that while decedent had previously worked about such derrick, he had no knowledge of such defects, and that neither he nor the engineer, who operated the derrick engine pursuant to signals from the superintendent, had any opportunity to learn of such defects, was sufficient to sustain a verdict for plaintiff. p. 624.
6. **MASTER AND SERVANT.—Injuries to Servant.—Defective Appliances.—Fellow Servants.—Instructions.**—In an action for the death of an employe by the slipping of a derrick cable from the drum, where there was evidence that the cable was of insufficient length and that it was defectively attached to the drum, an instruction stating that the persons who were at the time engaged in moving a girder by means of such derrick were fellow servants, and that defendant would not be liable if the injury was caused by their negligence, was properly refused because it ignored the element of the master's negligence with reference to the defective method in which the cable was attached to the drum. p. 626.
7. **MASTER AND SERVANT.—Injuries to Servant.—Vice-Principals.—Instructions.**—In an action for the death of a servant, where there was evidence to show that a part of the duties devolving on the foreman required him to furnish defendant's employes with reasonably safe tools and a reasonably safe place in which to work, a requested instruction as to the negligence of fellow servants which would indicate to the jury that, although such foreman was negligent in performing a duty owing by the master and such negligence assisted in producing the injury, defendant would not be liable, was properly refused. p. 626.
8. **APPEAL.—Review.—Refusal of Instructions.**—Requested instructions not applicable to the evidence, or which ignore the evidence on a material element of the case, are properly refused. p. 627.
9. **APPEAL.—Review.—Instructions.—Joint Exceptions.**—Alleged error in the giving of instructions will not be considered where the exception thereto was a joint exception and appellant makes no claim of error except as to one of such instructions. p. 627.
10. **MASTER AND SERVANT.—Injuries to Servant.—Defective Machinery.—Evidence.—Admissibility.**—In an action for the death of an employe caused by the slipping of a derrick cable from the drum while a heavy girder was being placed, where it was

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charged that the cable was defectively attached to the drum and was too short for the proper handling of such girder, testimony of experts as to the proper manner of fastening cables to the drums of derricks, the method of safe operation, and as to the suitable length of a cable under the conditions shown, was properly admitted, since they were matters about which such witnesses had peculiar knowledge and as to which they were competent to testify. p. 628.

11. EVIDENCE.—*Weight and Sufficiency.—Expert Testimony.*—The weight to be given to expert testimony is for the jury to determine. p. 628.

From Franklin Circuit Court; *George L. Gray*, Judge.

Action by Bessie Munson, administratrix of the estate of Fred W. Munson, deceased, against the Kelly Atkinson Construction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Zane, Morse, McKinney & McIlvaine, Shope, Zane, Busby & Weber and *Bracken & Kidney*, for appellant.

David K. Tone, Henry M. Ashton and *George F. O'Byrne*, for appellee.

IBACH, C. J.—Appellee as administratrix of the estate of Fred W. Munson, her deceased husband, began this suit against appellant in the Marion Circuit Court to recover damages for negligently causing his death. A change of venue was taken to Franklin County, where trial by jury resulted in a verdict and judgment in favor of appellee for \$4,800.

The overruling of separate demurrers for want of facts to each of the two paragraphs of complaint is assigned as error. Decedent was employed by appellant to assist in the work of elevating the tracks of the Big Four railroad over Washington street in the city of Indianapolis, and while engaged at his work, he was killed by reason of a cable, which held suspended a heavy steel girder, becoming detached from the "drum" of the derrick, thereby causing the girder to fall upon him. In substance, the averments of the first paragraph of complaint, so far as they are mate-

rial to be stated here, are that the defendant had as a part of its machinery used in the work of elevating the tracks a steam derrick permanently fastened upon what is termed a "derrick car". This derrick consisted in part of a drum eighteen inches in diameter, which revolved by means of power supplied from an engine; when the drum revolved the wire cable or rope attached at one end to the drum and at the other to "blocks" would become wound upon the drum or released therefrom, according to the manner in which such power was applied. Attached to the "block" were "grabs" which gripped the girders and other heavy articles which were to be elevated and placed in their proper position. The cable or rope was fastened to the drum by means of a rod or hook bolt. "Said cable was then and there insecurely and improperly attached to said hook and to said drum and when heavy material was then and there being hoisted by said derrick and when said cable was then and there unwound from said drum so that very little cable remained on said drum, said cable was then and there apt to and liable to pull off and slip off from said hook and become detached and disconnected from said drum." There was knowledge of all these conditions on the part of appellant, and a want of knowledge on the part of decedent. "Owing to the insufficient and improper manner in which said cable was then and there fastened to said drum, it was then and there unsafe and dangerous to then and there start the engine in motion, and to either raise or lower said girder." Appellant's superintendent who was in charge of the work and its representative, whose order decedent was required to obey, with knowledge of the improper cable attachment, directed the work to proceed, and while plaintiff's decedent, in ignorance of the said insecure fastening was assisting in removing said girder, said cable pulled loose from said drum, wholly on account of appellant's negligence, causing the girder to fall, killing decedent. These allegations, when considered with all the other averments of the complaint,

make it apparent that this paragraph proceeds upon the theory that appellant was negligent in failing to securely fasten the cable to the drum. The same facts are pleaded in the second paragraph, with the additional charge that the “defendant carelessly and negligently supplied the crane with a cable that was then and there too short and not of sufficient length.”

It is insisted by appellant that the averments of the complaint show that decedent was killed solely through the negligent operation of the derrick. This, however, does not appear from the complaint. The complaint charges

1. that the accident happened by reason of the negligence of the master in furnishing unsafe and defective machinery, and negligence in permitting the entire length of cable to become unwound from the drum, the engineer operating the engine in accordance with the signals and orders given by appellant’s superintendent, all of which facts, being well pleaded, the demurrer admits to be true.

Complaints similar in most respects to the one before

2. us have been uniformly supported by the courts of this and other jurisdictions, where the averments make it appear that the injury occurred to the employe through the combined negligence of the master in supplying unsafe machinery, and of a fellow servant in the operation of the same. It is only when the master has exercised reasonable care and prudence in supplying tools and appliances to his employes which are reasonably safe and proper for the service required of him, and the injury occurs solely through the negligence of a fellow servant, that the master will be held blameless. *Ohio, etc., R. Co. v. Stein* (1894), 140 Ind. 61, 69, 39 N. E. 246; *Rogers v. Leyden* (1891), 127 Ind. 50, 53, 26 N. E. 210; *Eureka Block Coal Co. v. Wells* (1902), 29 Ind. App. 1, 61 N. E. 236, 94 Am. St. 259.

We have already indicated that the specific charges of negligence pleaded against appellant as the cause of the death of decedent are that the cable was not safely and prop-

erly attached to the drum, that the cable was not
3. of sufficient length to safely perform the work for which it was used, and that an order was given to start the engine when the cable was unwound from the drum. These averments charge actionable negligence on appellant's part. The complaint was sufficient to withstand demurrer. See *Clear Creek Stone Co. v. Dearmin* (1903), 160 Ind. 162, 66 N. E. 609.

The evidence discloses that just prior to the killing
4. of Munson, appellant had been engaged in constructing bridges for the Big Four railroad at other points outside of Indiana, and about twelve days before the
5. accident resulting in Munson's death, he had been hired by one Beck, who, it is shown was appellant's superintendent, and was also in charge of and directed the work at Indianapolis. Munson, with other laborers, had used the same derrick and appliances at Fairland, Indiana, but he had nothing whatever to do with the operation of any of the machinery, or with fastening the cable to the drum. Beck provided all the machinery, tools and appliances, and generally supervised the work, both at Indianapolis, and at other points prior to moving the machinery to Indianapolis. The girder which was being moved when Munson was killed weighed about seventeen and one-half tons, and required three blocks and a long and heavy cable to handle it. Prior to the accident girders weighing only two tons had been handled, and in handling them only about one-half of the length of cable was used, thus allowing the remaining half to be wound about the drum. At this point we may add that, on account of this fact alone, neither Munson nor the engineer, Burgess, had any opportunity to ascertain the length of the cable or the manner in which such cable was attached to the drum, and it appears nowhere in evidence that either of these men obtained any knowledge of such facts from any source. Consequently, the insistence made by appellant that Burgess was guilty of the negligence

which caused Munson's death has no support from the evidence. The engineer also testified that the reason he did not see the cable run off the drum was because he had his head out of the window on the side of the derrick car receiving the signals controlling the operation of the derrick, and it could not be operated in any other manner, that it was only by these signals that he could learn the order of the superintendent, and operate his engine in conformity to such orders. Expert witnesses testified that the safe and proper way to attach a cable to the drum of a derrick was by using a cable clamp or U bolt with the cable put through the clamp and the nuts tightly screwed on. The cable in the case at bar was not so fastened, but was merely put through a hook where it was liable to slip out. Burgess the engineer said: "If the cable was fastened with a hook bolt at the time of the accident, it was liable to pull out, but if fastened by a clamp it would not, the cable would break first." Witnesses of long experience with this class of work testified that a suitable cable to be used in lifting the girder in suit should be long enough to reach the ground when working the boom from the highest to its lowest point, and leave seven or eight coils about the drum. Mr. Kelly, appellant's president, testified that the standard length of the cable for such work was 450 or 475 feet. This cable, however, was but 350 feet long. Superintendent Beck admitted that "if the derrick had been supplied with a cable 450 feet in length the load which was being lifted could have been lowered to the ground." The evidence also shows that this same superintendent ordered decedent, with another laborer, Lawrence, who also was killed, to put ties under the girder while it was suspended, that while they were obeying this order, he, Beck, gave the signal to the engineer to start the derrick. There was an outcry, the two men started to run away, but before they had time to escape, the girder fell. It is also shown by Mr. Kelly, appellant's president, that the last time the cable

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and its fastening to the drum were examined was eighteen months before the accident. The evidence is sufficient to sustain the verdict.

It is argued that the court erred in the giving of and refusal to give certain instructions. Appellant insists that the

court erred in refusing to give to the jury its re-

6. quested instructions Nos. 1, 3 and 4. Instruction No.

3 is as follows: "The court instructs the jury that the members of the gang of men engaged upon the girder as set out in plaintiff's complaint were fellow servants while they were engaged in moving said girder, and this applied to the foreman Beck, the pusher Lawrence, and the engineer Burgess, and if the jury believe from the preponderance of the evidence that the death of the plaintiff's intestate, the deceased, Fred W. Munson, was occasioned by the negligence or carelessness or either of said Beck or said Lawrence or said Burgess, or either or all of them, the jury should find for the defendant." This instruction as applied to the facts of this case must be held to be erroneous, and it was properly refused, for the reason that it ignores the very material fact shown by the evidence that one of the contributory causes of the decedent's death was the defective and unsafe manner in which the cable was fastened to the drum, which fact, if shown by a fair preponderance of the evidence, would authorize a finding of negligence against appellant, even though the fellow servants of decedent also contributed to bring about the result which did follow.

This instruction was erroneous for the further reason that by it the jury was told that in any event there could be no

recovery on account of the negligence of Beck the

7. superintendent or the person representing appellant

in the direction of the work. There was evidence to show that as a part of the duties devolving upon Beck he was to furnish appellant's employes with reasonably safe tools and a place to work which was also reasonably safe, and yet, in view of the evidence, upon this proposition, the in-

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struction would indicate to the jury that although Beck was negligent in performing a duty owing on the master's part, whom he represented as a vice-principal, and such failure on his part assisted to bring about the fatal accident, yet appellant would not be liable.

Instructions Nos. 1 and 4 tendered were likewise properly refused because improper as applied to the facts of this case, and in each instance eliminating all evidence

8. with reference to the defective condition of the appliances furnished by appellant with which decedent was required to work. There is no evidence that a cable of sufficient length was supplied by appellant, and that the derrick was equipped with a shorter one by a fellow servant of decedent without the knowledge or direction of appellant. The fourth is additionally defective because it states that if the derrick was operated in a careless manner by the engineer, there could be no recovery, whether such machinery was reasonably safe for the work in which they were engaged, or not. Similar instructions to these were held insufficient in the case of *Ohio, etc., R. Co. v. Stein, supra*.

The further error assigned "that the court erred in giving instructions Nos. 5 and 7" will not be considered. The exception taken to the giving of these instructions was

9. a joint exception, and not a separate exception as to each. No claim is here made that instruction No. 7 is erroneous, and in fact, it is a correct statement of the law applicable to the pleadings and the evidence. See *Inland Steel Co. v. Smith* (1907), 168 Ind. 245, 252, 80 N. E. 538, and cases there cited. We have examined all of the instructions tendered and refused, and those given, and we are convinced that the law applicable to the case was correctly stated to the jury in the numerous charges given, both at appellant's request, and on the court's own motion.

It is also contended by appellant that there was error at the trial in the admission of certain expert testimony. The testimony earnestly objected to is that given by three wit-

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nesses who testified as to the proper manner of fastening cables to the drums of derricks, how “booms”, such as the one described in the case, could be operated with safety, and what a suitable length of cable would be under all the conditions shown by the proof and for the accomplishment of the work in which appellant was engaged. These were matters largely of science and skill, and of which, by study, observation and experience, the witnesses had obtained and were possessed of peculiar knowledge. They were matters also about which the average jury could not become informed so as to arrive at an accurate conclusion without the aid of the testimony of such persons as had given the subjects their special thought, time and attention. We believe these witnesses were competent to testify, and the investigation of the subject-matter in controversy required the aid of such testimony to assist in giving to the jury facts essential to a proper solution of the questions involved. It was for the jury to determine

11. the weight of such testimony. *Indiana, etc., Coal Co. v. Buffey* (1901), 28 Ind. App. 108, 62 N. E. 279; *Louisville, etc., R. Co. v. Frawley* (1887), 110 Ind. 18, 9 N. E. 594.

We find that no error was committed at the trial, and the judgment is affirmed.

NOTE.—Reported in 101 N. E. 510. See, also, under (1) 31 Cyc. 333; (2) 26 Cyc. 1302; (3) 26 Cyc. 1386; (4) 26 Cyc. 1454; (5, 7) 26 Cyc. 1447; (6) 26 Cyc. 1474, 1477; (8) 38 Cyc. 1617, 1627; (9) 38 Cyc. 1795, 1800; (10) 17 Cyc. 232; (11) 17 Cyc. 262. As to what are proper subjects of instructions to jury, see 72 Am. Dec. 538. As to duty of master to furnish servant with safe means and appliances to work with, see 92 Am. Dec. 213; 21 Am. Rep. 579; 33 Am. St. 766. As to instructions of court assuming existence of facts, see 14 Am. St. 44. As to basis of rule of assumption of risk, see 131 Am. St. 437. As to assumption of risks of dangerous machinery, see 119 Am. St. 434. As to the subjects and admissibility of expert testimony, see 66 Am. Dec. 228. On the question of the master's liability for failure of employes exercising superintendence to furnish proper appliances, see 58 L. R. A. 46. As to the liability of a master to his servant for injuries caused by a derrick, see 20 Ann. Cas. 896.

GREGORY v. REDD.

[No. 8,072. Filed June 20, 1913.]

1. PLEADING.—*Complaint.—Actions Before Justices of the Peace.*—In actions commenced before justices of the peace, a complaint is good on demurrer if it contains sufficient substance to inform the adverse party of the nature of the demand against him and to bar another action for the same cause. p. 630.
2. PLEADING.—*Complaint.—Initial Attack After Verdict.—Action Commenced Before Justice of the Peace.*—The complaint in an action commenced before a justice of the peace, from which defendant could know that the demand was for breach of a certain warranty, and which contained sufficient facts to bar another action for the same demand, was sufficient as against an attack made for the first time after the verdict of the circuit court to which the cause had been appealed. p. 630.

From Wayne Circuit Court; *Henry C. Fox*, Judge.

Action by John Redd against James Gregory. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George W. Pigman and *Robbins & Robbins*, for appellant.

W. F. Bossert and *Shiveley & Shiveley*, for appellee.

LAIRY, J.—This action originated before a justice of the peace. The plaintiff recovered a judgment and the defendant appealed to the circuit court where the case was again tried before a jury upon the issues formed by the pleadings filed in the justice's court and a verdict was returned in favor of plaintiff. After verdict the defendant filed a motion in arrest of judgment upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This motion was overruled and judgment rendered for plaintiff on the verdict. The defendant prosecuted this appeal and assigns as error that the complaint does not state facts sufficient to constitute a cause of action and also that the court erred in overruling his motion in arrest of judgment.

It is a well-settled rule of pleading in actions commenced

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before a justice of the peace, that a complaint which contains sufficient substance to inform the adverse party of

1. the nature of the demand against him and to bar another action for the same cause will be held sufficient on demurrer. *Brown v. Thompson* (1910), 45 Ind. App. 188, 90 N. E. 631, and cases there cited. In this case the

objections to the complaint are interposed for the
2. first time after verdict. The complaint is subject to serious criticism, but we are of the opinion that it was sufficient to inform the defendant that plaintiff was making a demand for damages resulting from a breach of warranty made by the defendant in the sale of a certain horse to plaintiff, and that the facts stated are sufficient to bar another action for the same demand.

Judgment affirmed.

NOTE.—Reported in 102 N. E. 140. See, also, under (1) 24 Cyc. 558; (2) 24 Cyc. 570.

BROWN-KETCHAM IRON WORKS v. THE GEORGE B. SWIFT COMPANY.

[No. 7,716. Filed January 31, 1913. Rehearing denied June 20, 1913.]

1. PLEADING. — *Plea in Abatement.* — *Requisites.* — *Certainty.* — A plea in abatement must be certain in every particular so as not only to point out the plaintiff's error, but to show him how it may be corrected in another suit in regard to the same cause of action, that is, it must leave nothing to be supplied by intendment or construction, and must obviate every supposable special answer. p. 637.
2. CORPORATIONS. — *Foreign Corporations.* — *Actions.* — *Service of Process.* — *Plea in Abatement.* — *Theory.* — *Requisites.* — In an action against a foreign corporation, a plea in abatement grounded on the theory that, on account of defendant's withdrawal from the State and the revocation of the authority of its agent to accept service of process, the court had been deprived of any jurisdiction of the defendant, would be insufficient without a showing that the cause of action did not arise within the State; but such denial is not essential in a plea where the theory is

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that the court has not obtained jurisdiction of the person of defendant by the service of process upon its alleged agent and that such service should be set aside and the summons quashed. pp. 638, 640.

3. CORPORATIONS.—*Foreign Corporations.*—*Actions.*—*Service of Process.*—*Sufficiency of Service.*—*Jurisdiction.*—The question of whether service of process in an action against a foreign corporation was had on an authorized agent is in no way affected by the existence or nonexistence of money, credits or effects within the State belonging to defendant or due to it, but a showing as to whether the same existed would be essential in determining whether the court might, by a supplemental pleading in attachment or garnishment, acquire such jurisdiction of the person as would enable it to proceed to final judgment *in rem.* p. 638.
4. CONSTITUTIONAL LAW.—*Due Process of Law.*—*Deprivation of Property.*—One may not be deprived of his property without due process of law. p. 638.
5. PROCESS.—*Service.*—*Personal Judgment.*—A court cannot acquire jurisdiction over the person of one not residing within its territorial jurisdiction, so as to warrant a personal judgment, except by actual service of notice on him within the jurisdiction, or on one authorized to accept service in his behalf, or by his waiver of the want of due service. p. 638.
6. PROCESS.—*Constructive Service.*—*Judgment in Rem.*—In an action *in rem*, the court, by constructive service on a person residing beyond its territorial jurisdiction, whose property is sought to be affected or taken, may acquire such qualified or limited jurisdiction over the person as will enable it to render a judgment depriving him of such property. p. 639.
7. PLEADING.—*Construction.*—*Theory.*—Ordinarily the theory of a pleading is to be determined not by its prayer alone, but by its averments taken in their entirety. p. 641.
8. CONSTITUTIONAL LAW.—*Pursuit of Business.*—*Rights of Citizens of Other States.*—The legislature has no power to prevent a citizen of another state from coming into this State, or to prohibit him from doing business therein since such right is given both by the organic law of the State and of the United States without the permission or comity of the state. p. 644.
9. CORPORATIONS.—*Foreign Corporations.*—*Right to Exclude or Restrict.*—The State, by legislative enactment, may grant or refuse a foreign corporation the right to do business within its borders, and may provide the terms and conditions on which such corporation may come into the State for such purpose. p. 644.
10. CORPORATIONS.—*Foreign Corporations.*—*Actions.*—*Process.*—The State may not only provide the manner and mode of service of obtaining jurisdiction over foreign corporations doing busi-

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ness therein, but may also require such corporations to accept the terms of the mode of service so provided as a condition precedent to doing any business in the State. p. 645.

11. CONSTITUTIONAL LAW.—*Due Process of Law.—Deprivation of Property.—Foreign Corporations.—Process.*—When the question is properly raised in an action against a foreign corporation the court must determine whether the prescribed mode of service does in fact deprive such corporation of its property without due process of law, and its determination is generally final in so far as property within the jurisdiction of the State is affected; but where the judgment affects property in another state, or is questioned in a court of such state, such court may determine for itself whether the prescribed mode of service is consistent with due process of law. p. 645.

12. CORPORATIONS.—*Foreign Corporation.—Service of Process.—Validity of Prescribed Method.—Recognition by Federal Courts.*—The mode of service prescribed by the laws of a state for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, obtains similar recognition in the federal courts, in so far as the same affects property of foreign corporations within such state. p. 646.

13. CORPORATIONS.—*Foreign Corporations.—Regulation.—Service of Process.—Statutes.—Validity.*—The act approved March 15, 1901, Acts 1901 p. 621, prescribing the conditions on which foreign corporations could be admitted to transact business in the State, and providing a method for service of process in actions against foreign corporations, was a proper exercise of legislative power. p. 646.

14. CORPORATIONS.—*Foreign Corporations.—Regulation.—Right to Change Conditions.—Withdrawal From State.—Revocation of Agent's Authority.*—While succeeding legislatures may revoke, modify or change the conditions upon which a foreign corporation is permitted to do business within the State, such an act could apply only to the future business of such corporation, so that any right that such corporation may have, based on the theory of mutuality of right and privilege, to withdraw from the State and revoke the authority of its agent in the State, could affect only its future business and could not affect or take away any rights growing out of business already done by such corporation under its license. p. 646.

15. CORPORATIONS.—*Foreign Corporations.—Termination of Agency.—Appointment of Successor.*—Upon the death or resignation of an agent of a foreign corporation appointed as a condition precedent to doing business in the State, or upon the termination of such agency from any cause, it is the duty of such corporation to appoint a successor so long as liabilities re-

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sulting from business already done under its license remain outstanding. p. 648.

16. CORPORATIONS.—*Foreign Corporations.—Effect of Accepting License.—Process.—Service on Agent.*—A foreign corporation by accepting a license to do business in the State pursuant to the act approved March 15, 1901, Acts 1901 p. 621, and by complying with the conditions thereof and naming an agent upon whom service of process may be had, and by coming into and doing business within the State under such license, in effect agrees that service of process under such act shall be a valid service against it, when sued by a citizen of the State on a contract made in the State during the time it was so doing business, and in such an action it may not defeat the jurisdiction obtained by such service by showing a revocation of its agent's authority to receive such service, unless it also shows that thereafter another agent was appointed on whom process may be had. p. 649.

17. CORPORATIONS.—*Foreign Corporations.—Regulations.—Statutes.*—The purpose of the act approved March 15, 1901, Acts 1901 p. 621, providing conditions for the admission of foreign corporations to do business in the State, was not only to give to such corporations the right to do business within the State, but also to provide a method of making them yield to the jurisdiction of the courts of the State when necessary to determine the rights of citizens of the State by reason of business transacted by such corporations within the State. p. 649.

18. STATUTES.—*Construction.—Legislative Intent.*—The legislative intent will be carried out when it can be ascertained from the act, and where two constructions are possible, that one which gives effect to the act will be adopted rather than the one which would defeat the purpose of the law. p. 652.

19. CORPORATIONS.—*Foreign Corporations.—Actions.—Service of Process.—Plea in Abatement.—Sufficiency.*—In an action against a foreign corporation, a plea in abatement, alleging its withdrawal from the State and the revocation of the authority of its agent, was insufficient to show that the court had not obtained jurisdiction of the person of defendant by service on such agent, in the absence of allegations showing the appointment of another agent on whom service could be had. p. 652.

From Superior Court of Marion County (73,107); *James M. Leathers*, Judge.

Action by the Brown-Ketcham Iron Works against The George B. Swift Company. From a judgment abating the action, the plaintiff appeals. *Reversed.*

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R. M. Ketcham, H. S. Landers and W. A. Ketcham, for appellant.

Lew Wallace, for appellee.

HOTTEL, J.—Appellant, an Indiana corporation, brought this action against appellee, an Illinois corporation, to recover a balance alleged to be due it on account of material it furnished appellee. The complaint is in two paragraphs, the first of which is based on a written contract filed as an exhibit with said complaint and alleges in effect a refusal on appellee's part to make the payment to appellant for the material it furnished under such contract according to the terms thereof, and alleges that on September 24, 1906, there was a balance due on said contract of \$1748.23. In the second paragraph it is alleged in substance that the appellee is indebted to appellant in the sum of \$1748.23, being a balance for goods, wares and materials sold and delivered to appellee at its special instance and request; that demand had been made on appellee for payment of said sum and said amount remained due and wholly unpaid. Both paragraphs aver, in substance, that although appellee is a corporation, organized under the laws of the state of Illinois, that it had been admitted to transact business within the State of Indiana under and pursuant to the laws of said State, and "had duly designated an agent upon whom service of process might be had and that for the purpose of this case the defendant was found and was doing business within the State of Indiana."

The appellee entered a special appearance and filed a plea in abatement to which a demurrer filed by appellant was overruled. A reply of general denial to this plea closed the issues. The cause was tried by jury and at the close of all the evidence the court sustained a motion made by appellee for a peremptory instruction directing the jury to find for appellee upon its plea in abatement to which ruling of the court the appellant at the time excepted. The jury found for the appellee as directed by the court and thereupon ap-

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pellant filed its motion for new trial which was overruled and exceptions saved. Judgment was entered upon the finding of the jury that the action abate and that the appellee have and recover of the appellant the costs of the action to all of which appellant at the time excepted and prayed an appeal to this court.

The errors relied on for reversal are: (1) The court erred in overruling the demurrer of plaintiff (appellant) to defendant's plea in abatement; (2) the court erred in overruling the motion of the plaintiff (appellant) for new trial; (3) the court erred in the judgment entered.

The first question presented for our consideration is the sufficiency of the plea in abatement as against the demurrer. This plea avers that appellee's appearance is special only, and for the sole purpose of questioning the jurisdiction of the court over its person; that it is an Illinois corporation engaged solely in the business of general contracting with its principal and only place of business location and residence in the city of Chicago; that it at no time had any office or agent in the State of Indiana, except only and to the extent and in the manner hereinafter specifically stated; that in December, 1902, appellee had a contract for the construction work upon the Claypool Hotel, in the city of Indianapolis, and had sublet such work to divers subcontractors who furnished the materials and performed the labor, and that in connection with said contract appellee, under date of December 2, 1902, appointed A. W. Hatch its agent in Indiana, with authority as required by the Indiana foreign corporation law of 1901, and caused the writing containing such appointment to be filed with the Secretary of State of the State of Indiana; that on July 7, 1906, its board of directors at a meeting regularly convened, decided appellee should not do business in Indiana, and, by resolution duly adopted, cancelled, annulled and revoked the appointment of said A. W. Hatch and provided that appellee should thereafter maintain no office or agency in said State of In-

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diana; that thereupon appellee, by its president made and filed with the Secretary of State of the State of Indiana, an affidavit showing that no part of its capital stock was represented by its property located, or business transacted, in the State of Indiana, that it had no property located in said State, and that its appointment of its agent as aforesaid had been and was revoked; that the steps aforesaid were taken by appellee in good faith for the purpose of terminating the agency aforesaid for the reason that it was not then engaged and did not intend to engage in any business in said State, so as to bring it within the laws of Indiana relating to foreign corporations doing business in said State; that appellee did not remove any property from said State, except in the ordinary course of business as it completed the contract aforesaid; and it has not at any time done, or suffered anything to be done whereby any person, firm or corporation in said State holding any claim against it or its property in said State, was or might be defrauded, hindered or delayed; that said Secretary of State thereupon issued to it a certificate of revocation as follows: Here follows the certificate which is a statement signed by the Secretary of State showing simply the filing in his office by appellee of "an affidavit revoking the appointment of A. W. Hatch as agent in Indiana for said company, and declaring the intent of the corporation to no longer maintain an office or agent in this State". Then follow averments showing since said time appellee has done no business in said State and had no property office or agent therein; that the contract sued on was for material, none of which was to be used in Indiana but all of which was for use in construction work at the city of New Orleans, and that said contract was totally disconnected with any business at any time done by appellee in Indiana; that the summons in this cause was served upon said Hatch on or after February 16, 1907, at a time when he was in no way authorized to receive service of said summons and had no connection with appellee of any character,

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excepting only that he was then its attorney in respect to certain claims in litigation in said State, which claims have no connection with the contract set out in the complaint.

Appellant urges against the sufficiency of this plea: (1) That it fails in the requirement that it "must be certain to every intent in every particular and must anticipate every possible answer of the adversary." (2) "That it does not deny that the cause of action arose within this State which would be a possible answer." (3) "That it does not deny that the appellee had money, credits, or effects belonging to or due the appellee within this State." The fourth, fifth, sixth, seventh and eighth objections present practically the same question and will be hereafter referred to and discussed.

The first proposition above is amply supported by authority. "The criterion or leading distinction between a plea in abatement and a plea in bar is, that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action; or, in technical language, must give the plaintiff a better writ." * * * 'Certainty of

1. this sort, or "to a certain intent in *every particular*," requires the utmost fullness and particularity of statement, as well as the highest attainable accuracy and precision, leaving, on the one hand, nothing to be supplied by intendment or construction; and on the other, no supposable special answer unobviated.' " *Needham v. Wright* (1895), 140 Ind. 190, 194, 39 N. E. 510. See, also, *Ohio Oil Co. v. Griest* (1902), 30 Ind. App. 84, 87, 65 N. E. 534; *American Surety Co. v. State, ex rel.* (1912), 50 Ind. App. 475, 98 N. E. 829; *Lechner v. Strauss* (1912), 50 Ind. App. 414, 98 N. E. 444 and authorities there cited.

As to the second and third propositions above, we find authority in our own State and other jurisdictions as well, which seem to support appellant's contention, depending, we

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think, on the theory upon which the plea in abatement proceeds. If the theory of this plea in abatement be that on account of the withdrawal of appellee from the State, and the revocation of the authority of its agent to accept service of process, the courts of this State have been deprived of any jurisdiction of the defendant and that for this reason this action should abate, then we think that the contention of the appellant that the pleading should contain averments showing that appellee has no money, credits or effects belonging to or due it in the State and that the cause of action did not arise within the State of Indiana is well taken and supported by authority. On the other hand, if the theory of the pleading be that the court has not obtained jurisdiction of the person of the appellee by the service of process had upon Mr. Hatch and that such service should be set aside and the summons quashed, we think there would be no necessity for the averments insisted on.

The question whether service of process had been had on an authorized agent of the appellee could be affected in no way by appellee having or not having money, credits or effects belonging to or due it within the State, but the existence or nonexistence of such money, credits or effects within the State would determine whether the court might, by a supplemental or amended pleading in attachment or garnishment, acquire such jurisdiction of the person as would enable it to proceed to final judgment *in rem*.

It is an elemental principle of jurisprudence that one may not be deprived of his property without due process of law. It is also elemental that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction except by actual service of notice within the jurisdiction on him, or on one authorized to accept service in his behalf, or by his waiver, by general appearance or

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otherwise, of the want of due service. *Conley v. Mathieson Alkali Works* (1903), 190 U. S. 406, 410, 411, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Thompson v. Whitman* (1874), 18 Wall. 457, 21 L. Ed. 897; *D'Arcy v. Ketchum* (1850), 11 How. 165, 13 L. Ed. 648; *Knowles v. Gaslight, etc., Co.* (1873), 19 Wall. 58, 22 L. Ed. 70; *Hall v. Lanning* (1875), 91 U. S. 160, 23 L. Ed. 271; *Pennoyer v. Neff* (1878), 95 U. S. 714, 24 L. Ed. 565; *York v. Texas* (1890), 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604; *Wilson v. Seligman* (1892), 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338; *McCord Lumber Co. v. Doyle* (1899), 97 Fed. 22, 38 C. C. A. 34; *Goldey v. Morning News* (1895), 156 U. S. 518, 521, 15 Sup. Ct. 559, 39 L. Ed. 517, and authorities there cited. There are, however, two ways, by either of which, a person may be deprived of his property and such taking is sanctioned by the law and held not to violate the principle that prevents the taking without due process of law. These two actions are recognized and designated as actions *in personam* and actions *in rem*. While it is true, jurisdiction over the person which will warrant a personal judgment may be obtained only in the way above announced, the court,

6. in an action *in rem* by constructive service upon the person whose property is sought to be affected or taken, may obtain such qualified or limited jurisdiction over the person as will enable it to render a judgment depriving such person of the property over which it has obtained jurisdiction. So, in this case, if the appellee had property in the State of Indiana of any kind or character over which the trial court by a proper action *in rem* could have obtained jurisdiction, such court, in such an action by constructive service upon the appellee, could have obtained such limited or qualified jurisdiction of its person as would authorize a judgment directing the sale and disposition of such property and an application of the proceeds to appellant's debt.

Section 316 Burns 1908, §313 R. S. 1881, provides: "Ac-

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tions may be brought against a corporation created by or under the laws of any other state, government or country, in any court having jurisdiction of the amount demanded, by any person having a cause of action, in any county within the State, where any property, moneys, credits or effects belonging or due to the corporation may be found.” It would seem, therefore, under the rule above announced which requires a plea of this kind not only to anticipate all defenses but also “to point out plaintiff’s error and furnish it with material for avoiding the same mistake”, or in technical language, “give it a better writ”, that where such plea proceeds upon the theory that a court of this State can have no jurisdiction over the defendant, and that for such reason the action itself must abate, it must, by proper averment, show not alone that such corporation has withdrawn from the State, revoked the authority of its agent, and ceased to do business therein, but it must show the additional facts that such corporation has no property, money, credits or effects of any kind over which such court might obtain control or jurisdiction. In other words, in order that a plea of this character may abate an action, which arose in this State, such plea should aver facts showing not only that the way to a judgment *in personam* is closed because of lack of jurisdiction of the person of defendant, but it should go further and show that no way to a final judgment *in rem* remains open. *Rush v. Foos Mfg. Co.* (1898), 20 Ind. App. 515, 519, 534, 51 N. E. 143; *Gouner v. Missouri Valley Bridge, etc., Co.* (1909), 123 La. 963, 967, 49 South. 657; *Goodwin v. Claytor* (1904), 137 N. C. 224, 232, 235, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. 479; *Fisher v. Traders Mut. Life Ins. Co.* (1904), 136 N. C. 217, 48 S. E. 667, 669; *Connecticut Mut. Life Ins. Co. v. Spratley* (1899), 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Pennoyer v. Neff*, *supra*; *Fitzgerald Constr. Co. v. Fitzgerald* (1890), 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608. However, where it is clear that the plea in abatement

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proceeds solely upon the theory that the service had upon the corporation is not sufficient, because not upon an authorized agent of such corporation and seeks simply to quash or set aside such service it would seem from the authorities, *supra*, that there is no necessity for the averments insisted upon.

Some of the averments of this pleading, and especially the prayer, indicate that its theory is that the court has not and can not obtain any such jurisdiction of the appellee as will authorize a judgment of any kind affecting it or its property in this State and that the action should abate.

Ordinarily, the theory of a pleading is to be determined not by its prayer alone, but by its averments taken in their entirety. If we were to be governed by this rule we would say without hesitation, that the theory of this plea is simply that the service of process had on Mr. Hatch was not on an authorized agent of the appellee and that by reason of there being no proper service of process, the court had not obtained jurisdiction of the person of the appellee and that such service should be quashed or set aside. The trial court, however, seems to have tried and determined the case upon the other theory. It rendered a judgment abating the action. We have no doubt but that under the rule above announced requiring such strict accuracy and certainty in a pleading of this character, that the same was not sufficient to withstand the demurrer. If we are correct in our views on the questions already discussed, the demurrer to the plea in abatement should have been sustained and it would follow that the judgment should be reversed, but the sufficiency of this plea, as before indicated, is questioned upon other grounds. The fourth, fifth, sixth, seventh and eighth grounds of objection above referred to present a question which is doubtless of controlling influence in the case, and we take it that it will be to the interest of both parties to this litigation to have the question now determined.

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Under these grounds of objection appellant insists, in effect, that this plea is bad for the further reason that it affirmatively shows that appellee entered the State and complied with its statutory law authorizing it to do business therein, and duly designated and authorized an agent upon whom service of process could be had in all suits commenced against it in the State, and that the service of process had in this case was on the agent so designated and authorized by appellee. It is urged that these averments are sufficient to show that the service of process in the case was such as was authorized by the statute which permitted appellant to do business in the State; that appellee accepted the terms of the statute and appointed such agent and came into the State and did business therein, and that inasmuch as the statute makes no provision for a withdrawal from the State by such corporation, or for a revocation of the authority of the agent designated as the person upon whom service of process could be had in all suits against such corporation, that such consent for service of process extends to all actions relating to any business done by the corporation while so in the State, and that it follows that service on such agent is a valid service on the corporation for the purpose of any litigation growing out of any business done by such corporation while so in the State, notwithstanding it may have afterwards attempted to withdraw from the State and revoke the authority given such agent; that such corporation is doing business in the State, within the meaning of the law which gives it the right to do such business, when it is litigating claims in its favor in the State and also has claims outstanding against it in the State where such claims both for and against it arose while it was doing business in the State.

This question, so far as we have been able to find, has never been presented or passed upon by the courts of this State. However, we are not without authority on the question, and counsel upon either side of the case have materially aided us by able briefs in which are cited numerous authori-

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ties from state and federal courts which counsel insist support their respective contentions. We have examined with care the authorities cited and given the question discussed careful thought and consideration, and must confess that in our disposition of it we are not free from doubt. We think either side of the question has authority for its support and good reasons may be offered for either position. Our final conclusion in the matter and our reasons therefor will be indicated in our discussion of the question as presented by appellee's contention.

The law in force at the time appellant filed its suit in the court below, and on which it relies for its service of process is an act approved March 15, 1901 (Acts 1901 p. 621). The part of said act here involved provides as follows: "Sec. 1. * * * That every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this State, or to continue business therein, if already established, shall have and maintain a public office or place in this State for the transaction of its business, where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporations; and it shall designate an agent or representative in this State upon whom service of process may be had; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. * * * Sec. 2. * * * and the principal or agent in Indiana of the said corporation shall make and forward to the Secretary of State, with the articles or certificates above provided for, a statement duly sworn to of the proportion of the capital stock of said corporation which is represented by its property located and business transacted in the State of Indiana. * * * Upon a compliance with the above provisions by said corporation, the Secretary

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of State shall give a certificate that said corporation has duly complied with the laws of this State and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Indiana. And such certificate shall be taken by all courts in this State as evidence that the said corporation is entitled to all the rights and benefits of this act, and such corporation shall enjoy those rights and benefits set forth in its original charter or articles of association, unless this shall be for a greater length of time than is contemplated by the laws of this State, in which event the time and duration shall be reckoned from the creation of the corporation to the limit of time set out in the laws of this State.” The second section of this act was amended in 1903, but the amendment does not affect the question presented by this

appeal. In determining the validity of such statutes

8. and the force and effect to be given the same, it must

be remembered that a foreign corporation stands upon a different footing from that of a citizen of another state who comes within our borders to do business. The legislature would have no power to prevent such citizen from coming into the State or to prohibit him from doing business therein. This right is given to the individual by the organic law of the State and the United States without the permission or comity of the State. This is not

9. so with a corporation. The State may, by legislative

enactment, grant or refuse a foreign corporation the right to do business within its borders and may provide and prescribe the terms and conditions upon which such corporation may come into the State for such purpose. *Douglas v. Kentucky* (1897), 168 U. S. 488, 18 Sup. Ct. 199, 42 L. Ed. 553; *People v. Fire Assn. of Philadelphia* (1883), 92 N. Y. 311, 327, 44 Am. Rep. 380; *Woodward v. Mutual, etc., Ins. Co.* (1904), 178 N. Y. 485, 489, 490, 71 N. E. 10, 102 Am. St. 519; *Ex parte Schollenberger* (1877), 96 U. S. 369, 24 L. Ed. 853; *Baltimore, etc., R. Co. v. Harris* (1870), 12 Wall.

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65, 20 L. Ed. 354; *Barrow Steamship Co. v. Kane* (1898), 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Connecticut Mut. Life Ins. Co. v. Spratley*, *supra*; *Hooper v. California* (1895), 155 U. S. 648, 652, 15 Sup. Ct. 207, 39 L. Ed. 297,

and authorities there cited. And, while it is true

10. that the fundamental principle that no one shall be compelled to answer a complaint in a foreign jurisdiction except on such notice of the proceedings as is fair and reasonable must not be violated even in its application to foreign corporations, the distinction, above indicated, between the rights of a citizen of another state and the rights of such corporations permits the legislature of the respective states not only to provide the manner and mode of service for obtaining jurisdiction over such corporations which they deem fair and reasonable, but also to require of such corporation an acceptance of and compliance with the terms of the mode of service so provided as a condition precedent to its doing business in the State. See cases last above cited.

The courts of the respective states, when the question is properly raised in an action pending before them, must determine whether the mode of service that has been

11. thus prescribed by their respective legislatures does in fact deprive such corporation of its property without due process of law, and while such determination, generally speaking, may be final in so far as it affects property within the jurisdiction of such state, yet if it be sought to enforce such judgment and affect property in some other jurisdiction or if such judgment is questioned in an action pending in a court of some other jurisdiction, state or federal, such court is permitted to judge for itself, where the question is properly raised, whether the mode of service that has been prescribed by the laws of the particular state violates the fundamental principle above announced. *McCord Lumber Co. v. Doyle*, *supra*, and authorities there cited. Subject to the limitation just indicated "it is the

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established rule that a mode of service prescribed by
12. the state laws for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, will obtain similar recognition in the federal courts." *McCord Lumber Co. v. Doyle, supra*. See, also, *Lafayette Ins. Co. v. French* (1855), 18 How. 404, 406, 15 L. Ed. 451; *Ex parte Schollenberger, supra*; *St. Clair v. Cox* (1882), 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Goldey v. Morning News, supra*; *Barrow Steamship Co. v. Kane, supra*; *Connecticut Mut. Life Ins. Co. v. Spratley, supra*. These authorities, together with others herein-

13. after cited, convince us that the legislature was acting clearly within its right and power in passing the act in question, and that such act, even though its wording be such as to warrant the construction insisted on by appellant, would be upheld and sustained by the courts against the charge that it attempts to deprive the corporation affected by it of its property without due process of law. In fact, as we understand the contention of appellee, it, in effect, concedes that the legislature of the State might have enacted a law which would have enabled the appellant to have proceeded to a judgment on the process had in this case, but that having failed to provide for service of process after the withdrawal of the foreign corporation from the State, and having failed to provide that service on the agent designated by such corporation when found in the State should be a valid service on such corporation in any action based on a liability growing out of business done by such corporation while in the State, that the service of process in this case is without authority of law and of no effect.

Appellant on the other hand insists that the legislature intended, and that the words of the act will warrant the court in giving it the construction and meaning which

14. appellee concedes the legislature might have given it. So the real question in the case, as we see it, is the construction to be given the act in question. As affect-

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ing this question it is contended by appellee that the statute is governmental in character and can be changed, amended or repealed by any succeeding legislature and that for this reason an acceptance of, or compliance with its provisions by the corporation does not give rise to a contract. This contention is in the sense hereinafter indicated supported by authority. *Connecticut Mut. Life Ins. Co. v. Spratley, supra*; *Newton v. Board, etc.* (1879), 100 U. S. 548, 559, 25 L. Ed. 710; *Fertilizing Co. v. Hyde Park* (1878), 97 U. S. 659, 24 L. Ed. 1036; *Douglas v. Kentucky, supra*; *Hooper v. California, supra*. In this connection it is urged that appellee had the right upon public notice to terminate the authority of any agent designated by it, and withdraw from its domicile of business in the state, and thereafter jurisdiction cannot be acquired, at least in a strictly personal action, by service upon its former agent. As supporting this position appellee cites: *Gouner v. Missouri Valley Bridge, etc., Co., supra*; *Eureka Mercantile Co. v. California Ins. Co.* (1900), 130 Cal. 153, 62 Pac. 393; *Ervin v. Oregon Steam Nav. Co.* (1880), 22 Hun 598; *Sturgis v. Crescent Jute Mfg. Co.* (1890), 10 N. Y. Supp. 470; *People v. Commercial Alliance Life Ins. Co.* (1896), 40 N. Y. Supp. 269, 7 App. Div. 297; *DeCastro v. Compagnie Francaise, etc.* (1896), 76 Fed. 425; *McCord Lumber Co. v. Doyle, supra*; *Forest v. Pittsburgh Bridge Co.* (1902), 116 Fed. 357, 53 C. C. A. 577; *Cady v. Associated Colonies* (1902), 119 Fed. 420; *Lathrop-Shea, etc., Co. v. Interior Constr., etc., Co.* (1907), 150 Fed. 666. The following authorities on the subject of due process of law are also cited by appellee as tending to support its contention. *Goldey v. Morning News, supra*; *St. Clair v. Cox, supra*; *Mutual, etc., Life Assn. v. Phelps* (1903), 190 U. S. 147, 157, 158, 23 Sup. Ct. 707, 47 L. Ed. 987, 994; *Connecticut Mut. Life Ins. Co. v. Spratley, supra*; *Conley v. Mathieson Alkali Works, supra*; *Hunter v. Mutual, etc., Life Ins. Co.* (1910), 218 U. S. 573, 584, 31 Sup. Ct. 127, 54 L. Ed. 1155, 1160, 30 L. R. A. (N. S.) 686. In this

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connection it is insisted by appellee that inasmuch as the State has the right to revoke, amend or change the license under which such corporation does business that the rule of mutuality of right or privilege would suggest and require that the corporation may likewise surrender the privilege given by the license and revoke the authority of the agent named to receive service. It is a sufficient answer to this contention to say that while the above authorities recognize the right of succeeding legislatures to revoke, modify or change the conditions upon which such corporation is permitted to do business within the State, such revocation, modification or changes would affect and apply only to the future business of such foreign corporation and we have no doubt that any legislation which would in fact, affect or take from such corporation a right already acquired by it, under a law formerly enacted, would not be upheld by the courts. So that, if that mutuality of privilege and right insisted upon by appellee, growing out of the right of the State to revoke, change or modify the condition upon which its license is granted, should be conceded to appellee, its privilege, corresponding to that exercised by the State, would permit its revocation of the authority of its agent and withdrawal from the State to affect only its future business and would not permit appellant by such withdrawal and revocation to affect or take away a right of a citizen of the State growing out of the business already done by such corporation under its license.

It is suggested that the agent appointed by appellee might resign or die, and that his authority might be revoked and he be removed from the State, and that in such case

15. the only duty of the appellee would be to appoint another. To the extent that it would be appellee's duty to appoint another agent in case of a vacancy caused by death, resignation or revocation while there was outstanding liability growing out of the business already done under its license, we agree with appellee's contention.

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But, it is further insisted that the duty of the corporation in this respect continues only while it is, by law, “subject to the jurisdiction of the courts of Indiana, and this
16. is only while it is doing business in the State.” Some of the authorities cited above as relied on by appellee tend to support this contention, but we think the better reason is with the authorities which seem to modify or qualify this rule to the extent of holding that for the purpose of such service in a case involving liability growing out of business done under its license, service on the agent appointed for such service as to such business when found in the State, will be sufficient. Of course, if the act in question be considered only as a vehicle affording a means to the corporation to do business, it would be clear that when the corporation no longer wanted to do business, there would be no further reason for the agency.

The purpose of the law was not alone to secure or
17. give to the foreign corporation the right to do business within the borders of the State, but its purpose was likewise to afford to the citizens of the State with whom such corporation might do business the opportunity, in case it was necessary, to make such corporation yield itself to the jurisdiction of the courts of this State for the purpose of having determined any rights or liabilities that may have accrued to such citizens of the State by reason of the business done in the State by such corporation under its license. Such being the purpose of the law, the reason for the continuance of the agency after the withdrawal becomes apparent.

To give the condition imposed such a construction as will allow such corporation to come within the borders of the State and transact business with the citizens thereof
16. and receive all the benefits of such business, and then at its own pleasure, and, before discharging its liabilities growing out of the business already done and from which it had received all the benefits, allow such corpora-

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tion to withdraw from the State and by revoking the authority of its agent appointed to receive service of process avoid a service had on such agent when found and served in the State, in an action growing out of the business done under its license would be to render nugatory the condition upon which such license was given, and take from the act every protection and benefit which the legislature intended to give to the citizen who might do business with such corporation. If such plea contained proper averments showing that before the filing of appellant's complaint appellee had in fact revoked the authority of Mr. Hatch, upon whom the service of process was had in this case, as its agent upon whom process might be had, and that it had, in the manner provided by the act, designated another agent upon whom such service of process might be had, a different question would be presented, and appellee's position be supported by both reason and authority. In other words, it is not necessary, for the purposes of the question here involved, to hold, nor do we want to be understood as holding, that a foreign corporation which has accepted the benefits of the statute in question and done business within our borders may not whenever it sees fit to do so, cease doing business and withdraw from the State and revoke the authority given to the person named as the agent upon whom service of process may be had, and in fact withdraw such person from the State, and thereby, to a certain extent, defeat the purpose and intent of the law. If such corporation actually ceases doing business in the State, there will be no need by it, or by the citizens of the State, for the existence of such agent within our borders *for the purposes of future business* and the right to revoke the authority of such agent, or the method provided or adopted for such revocation in such case would be of little consequence or importance either to the corporation or the citizens of the State in so far as future business might be affected thereby for the very good reason that there would be no future business to be affected. What

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we do decide is that a foreign corporation by accepting the license given by the State under the act here involved and by complying with the conditions thereof and naming an agent upon whom service of process may be had, and by coming into and doing business within the State, under such license, and receiving the benefits derived from a business done thereunder, thereby, in effect, agrees that service of process under such act shall be a valid service against it when sued by a citizen of this State in a proper court of the State on a contract made in this State with such citizen during the time such corporation was doing business in the State under said license. And, in a suit growing out of such business, such corporation will not be permitted to defeat the jurisdiction of the court, obtained over the person of the defendant, by service of process had in such case in such court by a plea like the one here involved which, in effect, admits that such service was had in such case on the agent in this State so appointed by it to receive such service at a time when such agent was found in the State representing such corporation as its attorney in litigation growing out of the very business for the purpose of doing which such corporation obtained its license; unless such plea in addition to averments showing that such corporation had, at the time of such service, withdrawn from the State and revoked the authority of its agent so appointed to receive such service, also shows that after the revocation of the authority of such agent it properly designated and appointed another agent upon whom such service of process might be had for the purposes of litigation growing out of the business already done by it under its license.

We think this conclusion is clearly in accord with the purpose and intent of the act in question as indicated by its letter and spirit, and by the history of legislation upon this subject, taken in connection with the judicial sanction given to such legislation in the various courts of other jurisdictions, state and federal, evidenced by the authorities herein

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cited. That such intent and purpose of the legislature in enacting the statute in question should be kept constantly in view, and that it should have a controlling influence in construing the statute when it can be ascertained and collected from an examination of the whole as well as the separate parts of the statute, is well settled by the courts of this and other jurisdictions. *United States Sav., etc., Co. v. Harris* (1895), 142 Ind. 226, 231, 40 N. E. 1072, 41 N. E. 451; *State, ex rel. v. Roby* (1895), 142 Ind. 168, 182, 41 N. E. 145, 51 Am. St. 174, 33 L. R. A. 213; *Travelers Ins. Co. v. Kent* (1898), 151 Ind. 349, 354, 50 N. E. 562, 51 N. E. 723; *Middleton v. Greeson* (1886), 106 Ind. 18, 21, 5 N. E. 755; *Greenbush Cemetery Assn. v. Van Natta* (1911), 49 Ind. App. 192, 94 N. E. 899; *Pennsylvania Co. v. Mosher* (1911), 47 Ind. App. 556, 94 N. E. 1033; 2 Lewis' Sutherland, Stat. Constr. (2d ed.) §376. This intent will be carried out, when it can be ascertained from the act, although in doing so the strict letter of the statute may not be followed and "If two constructions are possible, that one should be adopted which makes effectual, rather than one which defeats the purpose of the law." *Greenbush Cemetery Assn. v. Van Natta, supra*. See, also, *Pennsylvania Co. v. Mosher, supra*, and authorities there cited.

We do not believe the averments of the plea in abatement sufficient to show that the court has not obtained jurisdiction over the person of the appellee, and for this reason as well as the other reasons above indicated the court improperly overruled the demurrers to said plea. We think this conclusion is supported by the authorities following: *Home Benefit Society v. Muehl* (1900), 109 Ky. 479, 59 S. W. 520, 521, 22 Ky. Law 1378; *Magoffin v. Mutual, etc., Life Assn.* (1902), 87 Minn. 260, 91 N. W. 1115, 1116, 94 Am. St. 699; *Germania Ins. Co. v. Ashby* (1901), 112 Ky. 303, 65 S. W. 611, 612, 23 Ky. Law 1564, 99 Am. St. 295; *Woodward v. Mutual, etc., Ins. Co., supra*; *Goodwin v. Claytor, supra*; *Johnston v. Mutual, etc., Ins.*

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Co. (1904), 87 N. Y. Supp. 438, 445, 446, 43 Misc. 251; *Johnston v. Mutual, etc., Ins. Co.* (1904), 45 Misc. 316, 317, 318, 319, 90 N. Y. Supp. 539; *Fisher v. Traders Mut. Life Ins. Co., supra*; *Moore v. Mutual, etc., Life Assn.* (1901), 129 N. C. 31, 39 S. E. 637, 638; *Ben Franklin Ins. Co. v. Gillett* (1880), 54 Md. 212; *Collier v. Mutual, etc., Life Assn.* (1902), 119 Fed. 617; *McCord Lumber Co. v. Doyle, supra*; *Mutual, etc., Life Assn. v. Phelps, supra*; *Hunter v. Mutual, etc., Life Ins. Co.* (1904), 89 N. Y. Supp. 849, 97 App. Div. 222. For modification of judgment see *Hunter v. Mutual, etc., Life Ins. Co.* (1906), 184 N. Y. 136, 76 N. E. 1072, 30 L. R. A. (N. S.) 677, 6 Ann. Cas. 291 or *Hunter v. Mutual, etc., Life Ins. Co.* (1910), 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; *Little v. Banks* (1881), 85 N. Y. 258; *Biggs v. Mutual, etc., Life Assn.* (1901), 128 N. C. 5, 37 S. E. 955; *Weymouth v. Washington, etc., R. Co.* (1873), 8 MacArthur 19; *Angel & Ames, Corporations* §§402-407; *Pennoyer v. Neff, supra*; *Connecticut Mutual Life Ins. Co. v. Spratley, supra*; *City Fire Ins. Co. v. Carrugi* (1871), 41 Ga. 660.

Judgment reversed with instructions to the court below to sustain the demurrer to appellee's plea in abatement, and with leave to it to amend such plea and for any other proceedings consistent with this opinion.

Adams, Felt, Shea, JJ., concur.

Ibach, C. J., and Lairy, J., dissent.

DISSENTING OPINION.

IBACH, C. J.—I can not concur in the opinion of the majority of this court.

It fully appears from the record in this cause that appellee is a foreign corporation organized for the purpose of constructing buildings, that it had complied with the laws of Indiana relating to foreign corporations, (Acts 1901 p. 621, amended in 1907, Acts 1907 p. 286, §4085 Burns 1908) and had obtained the contract to construct the Claypool Hotel

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in Indianapolis. After it had completed this building, it withdrew from the State, revoked its agent's authority, and gave notice of such revocation by filing the same in the office of the Secretary of State, where the original agent's appointment had been filed. At this time the Secretary of State accepted the surrender of the license previously granted. There is nothing about the entire transaction which would indicate lack of good faith, and the action of appellee in revoking the authority granted its agent was done in the most public manner possible.

It also appears that the claim sued on by appellant in this action does not arise from any business which appellee was permitted to do by the license granted to it by the State of Indiana. Appellant at the time was engaged in the manufacture of structural iron, and the particular iron in question here was manufactured, sold and bought to be used in a building which was being erected in the State of Louisiana, and all of the business covered by this claim could have been done by appellee without any license of any kind from this State, being interstate commerce, and it had no relation to and was in no wise connected with the business appellee had been given permission to perform in this State under the license granted it, therefore it does not seem reasonable to hold that when appellee appointed its agent as required by law to do in this State the business for which it was organized in the foreign state, that his appointment of agency could not be revoked when the business was concluded, but that such agent would continue to represent such foreign corporation so as to enable appellant to sue appellee here, rather than in the forum where such corporation actually resides.

When a foreign corporation desires to do business in this State it comes here in the manner provided for by our statute. So long as it continues with the business here for which it came, it remains under the jurisdiction of the courts of this State, and when it finally ceases to do business here,

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it is permitted to depart. The particular manner in which it is to depart is not defined by statute, but certainly it can not be claimed that because it once came it must forever remain—so that it seems to us that when appellee through its officers and board of directors adopted a proper resolution whereby it determined to end its business in Indiana and revoked the appointment of its agent theretofore made and filed a verified copy of such proceeding before the Secretary of State, it did all that could be done, in the absence of a direct statute upon the subject, to wind up all the business for which it originally came into the State, all of which is made to appear in the pleading filed by appellee in this cause.

It is also made to appear that these proceedings relative to the revocation of the agent's authority and the action taken in regard to their determination to cease doing business in this State was done months before the filing of this suit, and the service of the summons upon the former agent Hatch. But we understand from appellant's brief, that appellee at the time of such attempted service upon it in this action, had a suit pending in the courts of this State upon a claim growing out of the contract for the building of the Claypool Hotel, and that while defending this suit, appellee was still engaged in business here, so that service might be obtained upon appellee by serving summons upon its former agent, Hatch, although such agency had been revoked months prior to the bringing of the action. This contention however, has not been upheld by other courts. See, *New Mexico, ex rel. v. Baker* (1905), 196 U. S. 432, 25 Sup. Ct. 375, 49 L. Ed. 540; *Hunter v. Mutual Reserve Life Ins. Co.* (1910), 218 U. S. 573, 583, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686.

We have no doubt but that the legislature in granting terms upon which foreign corporations might be admitted to this State, might also have prescribed terms and methods of service of summons upon such corporations after they

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had ceased doing business here, just as is provided now with reference to insurance companies and some other corporations, but no such provisions are now to be found relating to corporations such as appellee. Such statutes as the ones now under consideration must be strictly construed, and this court cannot read into them provisions which clearly are not contained therein. For these reasons I am constrained to hold that when the defendant in apparent good faith withdrew its business from this State and continued to hold no property therein, the agency having been revoked many months before the bringing of this action, the subsequent purported service of summons upon such former agent was not service upon appellee.

Lairy, J., concurs in this opinion.

NOTE.—Reported in 100 N. E. 584, 860. See, also, under (1) 31 Cyc. 179, 180; (2) 31 Cyc. 184; (3) 19 Cyc. 1330; 32 Cyc. 560; (4) 8 Cyc. 1080, 1094; (5) 23 Cyc. 684, 687; (6) 23 Cyc. 687; (7) 31 Cyc. 84; (8) 8 Cyc. 1036; (9) 8 Cyc. 1043; 19 Cyc. 1226, 1251; (10) 19 Cyc. 1255; 32 Cyc. 560; (11) 8 Cyc. 728; (12) 8 Cyc. 1005; (13) 19 Cyc. 1251, 1255; (14) 19 Cyc. 1346, 1347; (16) 19 Cyc. 1346; 32 Cyc. 560; (17) 19 Cyc. 1251; (18) 36 Cyc. 1106, 1110; (19) 19 Cyc. 1346, 1348. As to citizenship and residence of foreign corporations for jurisdictional purposes, see 85 Am. St. 906. On the question of acquiring jurisdiction over foreign corporation by service of process, see 70 L. R. A. 532. As to what service of process upon a foreign corporation is sufficient to constitute due process of law, see 50 L. R. A. 589. On the exclusiveness of mode of service provided by statute requiring foreign corporations to designate person on whom service of process may be made, see 5 L. R. A. (N. S.) 298. As to compelling designation by foreign corporation of person upon whom process may be served as condition of right to do business, see 1 L. R. A. (N. S.) 558. For a discussion of the validity of a statute requiring a foreign corporation to appoint a resident agent for the service of process, see 6 Ann. Cas. 42.

CONTINENTAL CASUALTY COMPANY v. HUNT.

[No. 7,979. Filed April 18, 1913. Rehearing denied June 24, 1913.]

1. **INSURANCE.—Conditions.—Proofs of Death.—Time for Bringing Suit.—Waiver.**—Where an insurance company, after twice receiving notice of the death of the insured, wrote the beneficiary that the policy would be paid as soon as the company could take action on it, and that litigation would only complicate matters, it thereby waived conditions in the policy requiring the proofs of death to be made on blanks furnished by the company, and limiting the time for suing thereon. p. 657.

From Gibson Circuit Court; *Herdie F. Clements*, Judge.

Action by Clarie Hunt against the Continental Casualty Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Henry Kister, Manton Maverick and M. P. Cornelius, for appellant.

D. W. Duncan, for appellee.

ADAMS, J.—Appellant issued a policy of insurance to one George H. Hunt, wherein it agreed to pay to the wife of said Hunt, appellee herein, the sum of \$300, should the insured meet with an accident, resulting in his death within ninety days thereafter. George H. Hunt paid a membership fee, and made monthly payments of \$1.50 up to and including the month in which he was killed. During the summer of 1906, the insured was a night watchman at a mill near Crenshaw, Mississippi. On the night of July 17, 1906, he fell from a foot bridge, and suffered injuries from which he died ten days later.

It is conceded that notice of the accident was not
1. given as provided in the policy, and that suit was not commenced within the time stipulated in the policy. The case, therefore, turns on whether appellant waived these conditions. There is evidence tending to show that

within ten days after the death of the insured, the local agent of appellant at Princeton, Indiana, the agent who secured the contract, was notified of the death of George H. Hunt, and of the circumstances attending the same; that said agent informed the person representing appellee that the money would be paid in a few days. It is also shown by the evidence that a notice in writing was sent to appellant on August 8, 1906, and received at the Chicago office of appellant on August 10, 1906, but such notice was not on the blank forms provided by the company for such purposes, and said notice did not conform to the requirements of the company in a case of death by accident. It does appear, however, by ample evidence, that on August 24, 1906, appellant, by one L. E. Brown, superintendent of the claim department, wrote a letter to appellee, stating that the claim would be paid without litigation, and would be paid as soon as the company could take action on it; that on December 27, 1906, a second letter was written by appellant, signed by the same officer, wherein appellee was again advised that the claim would be paid; that litigation would only complicate matters, and that payment would be made as soon as the company could take action. It is well settled that a stipulation in an insurance policy, relating to the time within which action must be brought is for the benefit of the company, and, therefore, may be waived by the company. *Caywood v. Supreme Lodge, etc.* (1908), 171 Ind. 410, 413, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. 253, 17 Ann. Cas. 503, and cases cited. The same rule applies to a stipulation in regard to the time within which the proofs required must be made. *National Masonic, etc., Assn. v. McBride* (1904), 162 Ind. 379, 381, 70 N. E. 483, and cases cited. The obvious purpose of an insurance company in requiring the submission of formal proofs of death is for the protection of the company in the payment of claims. In this case, the company, by its agreement to pay, waived further proofs of death,

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and, by the request not to bring suit, waived the provision as to the time in which suit should be brought.

The judgment is affirmed.

NOTE.—Reported in 101 N. E. 519. See, also, 25 Cyc. 885, 912. As to waiver of forfeiture by requiring further proof of loss, see 9 Am. St. 236.

NEELY v. LOUISVILLE AND SOUTHERN INDIANA TRACTION COMPANY.

[No. 8,045. Filed June 24, 1913.]

1. CARRIERS.—*Injuries to Passengers.—Proximate Cause.—Contributory Negligence of Third Persons.*—Although a carrier is not liable for an injury to a passenger caused solely and proximately by the unauthorized, unforeseen and independent act of another passenger, if the servants of the carrier were also guilty of negligence which was a proximate cause, or was directly connected with the proximate cause of such injury, the fact that an act of a passenger also contributed thereto will not in and of itself relieve the carrier from liability. p. 664.
2. CARRIERS.—*Injuries to Passengers.—Degree of Care Required.—Receiving and Discharging Passengers.*—While a common carrier of passengers is not an insurer of their safety, it must exercise the highest degree of care consistent with the mode of its conveyance and the practical prosecution of its business for the safety and protection of its passengers, and the conductor in charge of a train or car is bound to know, if by the exercise of due care he could know, whether any person is attempting to get on or off his train or car before permitting the same to start in such manner as to injure the person so getting on or off. p. 665.
3. CARRIERS.—*Carriage of Passengers.—Commencement of Relation.—Boarding Street Car.*—By stopping its car, on the signal of a person desiring to take passage thereon, at a point where it is required to receive passengers, a street car company extends an invitation to him to become a passenger and he has a right to enter, and as soon as he steps upon the running board or steps of the car he becomes a passenger, and the company is bound to treat him as such. p. 666.
4. CARRIERS.—*Carriage of Passengers.—Duty of Carrier.—Opportunity to Board Car.*—It is the duty of a common carrier operating a street car to give to persons, intending to become passengers thereon at its usual stopping places, a reasonable opportunity to board the same. p. 668.

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5. **NEGLIGENCE.—Trial.—Question for Jury.**—Ordinarily negligence is a question of fact for the jury to determine, and it is only when the standard of duty is fixed and certain, or where the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law. p. 666.
6. **TRIAL.—Directing Verdict.—Requisites of Instruction.**—Where the court directs a verdict in the event the jury finds from the evidence certain facts to exist, the instruction should embrace all the facts and conditions essential to such a verdict. pp. 667, 668.
7. **CARRIERS.—Injuries to Passengers.—Instructions.—Ignoring Issues.**—In an action for injuries to a person attempting to board a street car, an instruction that if, while the conductor was going back to the rear platform to see if plaintiff was safely on board, the car was started upon a signal given by a passenger, which the motorman supposed was given by the conductor, the company was not liable, was erroneous in ignoring the possibility of defendant's agents being guilty of negligence in other respects which may have contributed to cause the injury. pp. 667, 668.
8. **TRIAL.—Erroneous Instructions.—Cured by Other Instructions.**—An instruction which in effect directs a verdict if certain facts are found to exist, but which is erroneous for omitting an element essential to such verdict, cannot be cured by other instructions given in the case. p. 669.
9. **APPEAL.—Harmless Error.—Burden of Showing.**—Where error is shown in giving an instruction, the presumption arises that it was prejudicial and the burden is on the appellee to show by the record that it was harmless. p. 670.
10. **APPEAL.—Harmless Error.—Erroneous Instructions.—Answers to Interrogatories.**—Error in the giving of an instruction as to the liability of a street car company to one who was injured while attempting to board its car, which stated that defendant would not be liable, if the starting signal was given by a passenger while the conductor was making his way to the rear platform to see if plaintiff was safely on board, and which ignored the possibility of other negligence by the defendant's servants which may have been a proximate cause of the injury, is not cured by the jury's answers to interrogatories which are silent on the question of the negligence of defendant's servants and which merely found the existence of the particular facts stated in the instruction as sufficient to warrant a verdict for defendant. p. 670.
11. **APPEAL.—Harmless Error.—Erroneous Instructions.—Applicability to the Evidence.**—The court on appeal will not weigh the evidence to determine if error in the giving of an instruction

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was harmless, but if the undisputed evidence shows that the injury received by one attempting to board a street car was caused solely by the act of a passenger in giving the starting signal, and that there was no negligence by defendant's agents, then a reversal would not be ordered on the ground that the court, in instructing that a verdict for defendant was authorized if the injury was caused by the act of a passenger in giving the starting signal, erred in ignoring the possibility of any negligence by defendant's agents which may have been a proximate cause of such injury. p. 670.

12. *APPEAL.—Harmless Error.—Erroneous Instructions.—Applicability to Evidence.*—In an action for injuries received while attempting to board a street car which started on a signal given by a passenger, evidence that the car started very suddenly with a jerk and threw plaintiff to the ground, was susceptible to the inference that in the manner of starting the car defendant's agents did not exercise the degree of care required of them, so that the error in an instruction which ignored the possibility of negligence by defendant's servants was not harmless. p. 671.

From Floyd Circuit Court; *William C. Utz*, Judge.

Action by Elizabeth Neely against the Louisville and Southern Indiana Traction Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Ewing & Roose and *Stotsenburg & Weathers*, for appellant.

Charles D. Kelso, for appellee.

HOTTEL, P. J.—This is an appeal from a judgment in favor of appellee in an action brought against it for damages for injuries alleged to have been sustained by appellant when attempting to board one of appellee's cars, at the intersection of Wenzel and Jefferson Streets, in the city of Louisville, Kentucky. The issues of fact were presented by a complaint and a general denial. A motion for a new trial was overruled and this ruling presents the only error assigned and relied on for reversal. The only grounds of this motion presented and argued are those which predicate error upon the giving of instructions Nos. 1 and 2 respectively, tendered by appellee. Before setting out either of these instructions we will indicate those averments of the

complaint which charge the negligence relied on, they, alone, being necessary to an intelligent understanding of the questions herein discussed and determined. These averments are as follows: "Plaintiff further avers that while she was so attempting to enter upon said car for the purposes heretofore alleged, and at the time when she so had one foot upon said step of said car and so had hold of said handholds as heretofore alleged, and before she had had time to step upon said car, or the platform or step thereof, the said motorman and agents and servants of said defendant then in charge of and operating said car carelessly and negligently, and without warning to this plaintiff suddenly and rapidly started said car forward with a sudden and violent jerk, thereby throwing and jerking this plaintiff off her feet, and said step, and violently throwing her to the street and ground and dragging her thereon and injuring her."

We will at this point also indicate some of the evidence to which said instructions were applicable and to which we will desire to refer in our disposition of the questions presented. The appellant testified to substantially the following facts among others: She started home from Louisville between 5 and 6 p. m.; went to the corner of Wenzel and Jefferson Streets to catch her car. She had her four year old daughter with her and was carrying two pasteboard suit boxes each being about two feet long and three inches thick, and strapped together. As the car approached she signaled it to stop, and it stopped "on the northeast corner. You always stop on * * * the north side of Jefferson and the east side of Wenzel." The car was crowded. The vestibule where she entered was narrow, with three steps leading up to it and there were four men on the back platform. She lifted the little girl up, some gentleman helping her, put the boxes on the step and started to get on, and (using her words) "put one foot on the step and one hand on the side, and looked up to see if some one would not help me

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on, and then it seems the car started, just *gave a jerk*
* * * *suddenly, yes, with a jerk* * * * I don't remember what happened. As soon as the car started, I remember it started, and the first thing I remembered was I was on the ground, and it seemed as though my limb was doubled under me, and I remember my limb and my head hurt me a good deal at the time." Other witnesses testified to substantially the same facts with reference to appellant's placing her child and packages on the car, and the manner of her attempting to get on. A witness, Minnie Reynolds, testified that the car started "*very suddenly.*" Robert W. Waite in an affidavit for continuance, made on appellee's behalf and introduced in evidence, stated in substance that a witness Rittger if present would testify that he was one of four persons on the rear platform. "The car was stopped on the north side of the intersection of said Wenzel and Jefferson Streets for the purpose of allowing the plaintiff, Elizabeth Neeley to board the same; that while she was attempting to board the car, and while she had one foot on the lower step and one foot on the ground, the car was *suddenly started* forward and by such forward motion, caused the plaintiff to be thrown to the ground, that the reason why said car started up was because another passenger, whose name to said H. Rittger, was not known, suddenly reached up, caught hold of the bell cord and pulled the same twice, thereby ringing the starting bell twice in the front platform and notifying and causing the motorman to put the car in motion before the plaintiff had safely got on board."

According to appellant's contention the sole question in issue between the parties on the trial of the cause, except the extent of the injuries, was whether appellee exercised the highest degree of practical care and diligence for appellant's safety while she was attempting to board the car at the time she was injured. Appellee puts the issue in a little different language when it says that "its defense

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* * * is based upon the one ground that the accident to the appellant was caused by the unauthorized * * * and unapprehended * * * act of * * * a passenger standing on the rear platform'' of its car. This

1. is, in effect, stating the same issue in different language only, because, while the appellee could not be charged with an injury to appellant, for which an act of one of its passengers, unauthorized and unforeseen by it, was the sole, independent and proximate cause, yet, it must be admitted that if appellant's agents were likewise guilty of any negligence which could be said to be a proximate cause of, or to be directly connected with the proximate cause of such injury, the fact that an act of a passenger was also a contributory cause to such injury, would not in and of itself relieve appellee from liability. *North Chicago St. R. Co. v. Cook* (1893), 145 Ill. 551, 556, 558, 33 N. E. 958; *Winona, etc., R. Co. v. Rousseau* (1911), 48 Ind. App. 248, 93 N. E. 34, 1028 and authorities there cited. Hence in its last analysis the real question in issue according to the statements of both appellant and appellee, was, whether appellee exercised toward appellant when she was attempting to board its car, that high degree of care which the law in such cases requires of carriers of the kind here involved toward their passengers.

It was to this particular question and issue that instruction No. 1, was directed and particularly applicable, hence its importance and controlling influence on the result of the case is apparent. It follows: Instruction No. 1 “* * * If you find from the evidence that the conductor was inside of the car performing his duties at the time the car stopped on the north side of the intersection of Wenzel and Jefferson Streets in the city of Louisville, Kentucky, for the purpose of allowing the plaintiff to board it and that the conductor immediately started back to the rear platform of the car for the purpose of seeing that the plaintiff safely got aboard the car before it again started, and that while making his

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way back there for that purpose, and without having any reason to apprehend that a passenger would give the starting signals before he got back to the rear platform, the car started in response to a signal, not given by any of the employes of said car or any other person authorized to do so, but by a passenger standing on the rear platform, which the motorman supposed to come from the conductor, then you are instructed the plaintiff cannot recover in said circumstances and your verdict should be for the defendant.”

As applicable to this question the courts of appeal of this State have expressed and announced the following rules or principles: (1) “A common carrier of passengers, 2. is not, under the law, an insurer of their safety, nevertheless, the law requires of it the exercise of the *highest degree of care* consistent with the mode of its conveyance and the practical prosecution of its business for the safety and protection of its passengers, and it is bound to continue the exercise of such care until its passengers have alighted from the cars at their destination, at the usual place of stopping the cars.” (Our italics.) *Indiana Union Traction Co. v. Keiter* (1911), 175 Ind. 268, 275, 92 N. E. 982. To the same effect, but more directly applicable to the particular facts of this case is the language of the court in the case of *North Chicago St. R. Co. v. Cook*, *supra*, quoted with approval by our Supreme Court in the case of *Louisville, etc., Traction Co. v. Korbe* (1911), 175 Ind. 450, 93 N. E. 5, 94 N. E. 768. The court in that case in considering the duty that the carrier, through its conductor, owed to the plaintiff said, “Carriers of passengers are held to the exercise of the utmost or highest degree of care, skill and diligence for the safety of the passenger that is consistent with the mode of conveyance employed. The car or train was in control of the conductor, and he was required to know, if by the exercise of due care, caution and diligence in the discharge of his duties he could

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know, whether any person was attempting to get *on or off* his train or car, before permitting the same to start in such manner as would be liable or likely to injure a person so getting *on or off* the same.” See, also, *Winona, etc., R. Co. v. Rousseau, supra*; *McCurdy v. United Trac. Co.* (1900), 15 Pa. Super. Ct. 29; *Leavenworth Elec. R. Co. v. Cusick* (1899), 60 Kan. 590, 57 Pac. 519, 72 Am. St. 374; 6 Am. Neg. Rep. 282; *Nichols v. Lynn, etc., R. Co.* (1897), 168 Mass. 528, 47 N. E. 427; *Haluptzok v. Great Northern R. Co.* (1893), 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; *Booth v. Mister* (1835), 7 Car. & P. *66; *Metropolitan R. Co. v. Jones* (1893), 1 App. Cas. D. C. 200; *Birmingham, etc., R. Co. v. Smith* (1889), 90 Ala. 60, 8 South. 86, 24 Am. St. 761; 2 Thompson, Negligence §1959; 3 Thompson, Negligence §3523; Nellis, Street Railroads 463. (2)

“When a person desires to take passage on a
 3. street-car, and signals such car, indicating his intention, if such person be at a point or place on the line where such car is required to stop to receive passengers, if the car is stopped * * *, the company thus extends an invitation to such person to become a passenger, and he has a right to enter. *He becomes a passenger under such circumstances as soon as he steps upon the running-board or steps of the car, and the company is bound to treat him as a passenger.* This proposition presupposes the fact that the employes in charge of the car are aware of the facts stated.” (Our italics.) *Citizens St. R. Co. v. Merl* (1901), 26 Ind. App. 284, 290, 59 N. E. 491, and authorities there cited. (3) It is the duty of a common carrier oper-

4. ating a street car to give to persons intending to become passengers thereon at its usual stopping places, a reasonable opportunity to board the same. *Citizens St. R. Co. v. Merl, supra*, 291, and authorities there cited.

(4) “Ordinarily, negligence is a question of fact for
 5. the jury to determine from the evidence and not for the court to declare as a matter of law * * *

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‘and it is only when the standard of duty is fixed and certain, or where the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law and not of fact.’ ” *Indiana, etc., Trac. Co. v. Sullivan* (1913), *ante* 239, 101 N. E. 401, and authorities there cited. See, also, *Buehner Chair Co. v. Feulner* (1905), 164 Ind. 368, 373, 73 N. E. 816 and authorities there cited; *Anderson v. Citizens St. R. Co.* (1895), 12 Ind. App. 194, 196, 38 N. E. 1109; *Hoggatt v. Evansville, etc., R. Co.* (1892), 3 Ind. App. 437, 442, 29 N. E. 941; *Pennsylvania Co. v. Hensil* (1880), 70 Ind. 569, 575, 36 Am. Rep. 188; *Wabash, etc., R. Co. v. Locke* (1887), 112 Ind. 404, 422, 14 N. E. 391, 2 Am. St.

193. (5) “It has always been held that where the

6. court directs a particular verdict, if the jury should find from the evidence certain facts to exist, the instruction must embrace all the facts and conditions essential to such a verdict.” *American, etc., Tin Plate Co. v. Bucy* (1909), 43 Ind. App. 501, 87 N. E. 1051 and cases cited. See, also, *Lake Shore, etc., R. Co. v. Johnson* (1909), 172 Ind. 548, 550, 551, 88 N. E. 849, and cases cited.

An application of the foregoing principles to the

7. instruction under consideration can lead to but one conclusion. It completely ignored the possibility of appellee’s agents being guilty of negligence in any respect other than as therein indicated, and by directing the jury to return a verdict for appellee in case it found the facts enumerated therein, the court in effect assumed that such agents were not negligent in any other respect and thereby and to such extent invaded the province of the jury and determined for the jury one of the questions, which, under the law, it was the jury’s right and duty to determine. Upon this question our Supreme Court in the case of *Wabash, etc., R. Co. v. Locke, supra*, at page 422 said: “It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may

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reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred.”

We do not mean to say that the court may not

6. assume or state hypothetically in an instruction, the facts within the issues and evidence, and direct the jury to return a verdict for the one party or the other in case it finds that such facts have been proven; but when the court undertakes to state the facts upon which a verdict may be returned for either party, it must state in its instruction every fact essential and necessary to a recovery by the party in whose favor the verdict is directed.

Under the instruction in question the appellee was

7. entitled to a verdict even though the motorman may have seen and known that appellant was not on the car, but in a place of danger when he, the motorman, received the starting signal and started the car, and appellee was likewise entitled to recover though such motorman may have carelessly and recklessly started the car with an unusual and unnecessary jerk and suddenness, and though the conductor may have heard the starting signal given by the passenger in time to have countermanded it before the car started. In discussing an instruction involving this last proposition the Supreme Court of Illinois in the case of *North Chicago St. R. Co. v. Cook, supra*, said: “It is also insisted that the court erred in giving the following instruction: ‘If the jury believe from the evidence that some person not in the employment of the defendant company rung the bell which started the train at the time in question, still that fact will not exempt the defendant company from liability in this case; provided, the jury believe from the evidence that the conductor could, by use of due care and diligence, have countermanded the unauthorized signal for starting the train in time to have prevented any injury to the plaintiff, if he, the conductor, had exercised due care and diligence in the discharge of his duties; and, provided

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the jury believe from the evidence the plaintiff at the time in question was in the exercise of reasonable care and diligence for his own safety.' The point made is, that the instruction 'failed to submit to the jury the question as to whether or not reasonable care on the part of the conductor required that he should have countermanded the signal, even if he could have done so in time to have prevented the injury to the plaintiff.' And that, as a matter of law, the fact that the conductor might, 'by the exercise of due care and diligence, have countermanded the signal,' even if the conductor did not know, and had no reasonable ground to believe, that any one was attempting to get upon the car, would make appellant liable, although the signal had been given by a stranger. We see no objection to the instruction. It was the duty of appellant to stop its car a sufficient length of time to enable appellee to get fully and safely on the same.'" See, also, *Nichols v. Lynn, etc., R. Co. supra*. We think it clear under the numerous authorities herein cited that the facts, hypothetically stated by the court, in the instruction in question were not such as to enable it to say conclusively and as a matter of law that the verdict should be for the appellee in case the jury found such facts to be proved; but, assuming such facts to be true, it still remained to be determined under the evidence, whether defendant's servants in *all respects other than those included in the instruction* had observed that "*utmost and highest degree of care, skill and diligence,*" for appellant's safety when she was attempting to board appellee's car required by the authorities before cited, and for this reason the giving of the instruction was clearly error. *Pittsburgh, etc., R. Co. v. Wright* (1881), 80 Ind. 236; *American, etc., Tin Plate Co. v. Bucy, supra*; *Lake Shore, etc., R. Co. v. Johnson, supra*; *Winona, etc., R. Co. v. Rousseau, supra*. Nor is

8. the instruction of that kind which may be added to or cured by other instructions given in the case. *Lake Shore, etc., R. Co. v. Johnson, supra*, and cases cited;

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American, etc., Tin Plate Co. v. Bucy, supra, 504, 505 and cases cited; *Pittsburgh, etc., R. Co. v. Wright, supra*.

Appellee insists that the instruction, if erroneous, 9. is shown to be harmless by the answers of the jury to interrogatories. In answer to a similar conten- 10. tion the Supreme Court in the case of *Louisville, etc., Traction Co. v. Korbe, supra*, at page 457, said: "The court having erred in giving the instruction, the legal presumption follows that such error was prejudicial to appellant and the burden is on appellee to show the contrary by the record." See, also, *Cleveland, etc., R. Co. v. Case* (1910), 174 Ind. 369, 91 N. E. 238. These answers rather tend to show that, in the return of its general verdict, the jury followed the directions given in the instruction, because such answers show that the jury found, in effect, the particular facts to exist which the instruction told it would authorize such verdict. The answers found nothing upon the subject of negligence as to the manner of the starting of the car, nothing upon the subject of what actual knowledge appellee's motorman had as to whether appellant was on the car or in a place of danger when he started it and nothing upon the subject of what the conductor did or, by the exercise of that high degree of diligence and care required of him, could have done in the way of countermanding, before the car was started, the starting signal so given by the passenger. As in the case just quoted from, so in this "the answers of the jury to interrogatories propounded to it do not sustain the contention of appellee that the error in giving the instruction was harmless."

Lastly, it is insisted, in effect, that these findings 11. when supplemented by the evidence, clearly show that appellee was not harmed by the instruction, and that the presumption indulged in favor of the general verdict and the judgment thereon requires us to search the record to affirm and that such search will conclusively show

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that appellee was not harmed. Appellant controverts appellee's contention that we should look to the evidence to ascertain whether harm resulted from an instruction which is erroneous, and relies on the case of *Wooters v. Osborn* (1881), 77 Ind. 513, 515. This case lends support to appellant's contention, but we do not think that it goes to the extent claimed. Of course this court will not weigh evidence to ascertain whether an erroneous ruling has been harmful, and, as above indicated, the burden is on appellee to show that no harm resulted to appellant from the giving of the erroneous instruction. Yet, if we could say that appellee has shown by undisputed evidence in the record that appellant's injury was due solely and entirely to the negligence in giving the starting signal and that there was no evidence of any kind showing any negligence on the part of appellee, or its agents, that in any way contributed to such injury, we think the rule which requires us to search the record to affirm, would require us, in such case, to say that such instruction was harmless and refuse to reverse on account of its having been given. However, when we look to the

evidence we find, as before indicated, that there was
12. affirmative evidence showing that when appellant had one foot upon the car step and her hand on the railing, ready to get upon the car, that it started *very suddenly with a jerk* and that she was thereby thrown to the ground. This evidence was susceptible of the inference that it was not the starting of the car alone, which caused appellant's fall therefrom, but that the suddenness of the starting, the jerk of the car when it started, may have been at least a contributory cause of such fall, and hence that appellee's agents, in respect to the manner of the starting of the car, at least, did not exercise the highest degree of diligence and care which the authorities before cited required of it. *Winona, etc., R. Co. v. Rousseau, supra*. The appellant was entitled to have the jury draw such inferences as it might

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draw from such evidence. The instruction in question ignored the existence of such evidence, and the possible inference that might be drawn therefrom and to this extent, at least, invaded the province of the jury and failed to include in the instruction all the essentials of that high degree of care and diligence on the part of the agents of appellee which the law makes necessary in such cases before the appellee was entitled to be relieved from liability.

In view of the conclusion reached, we deem it unnecessary to set out or discuss the second instruction objected to, further than to say that in its main features it has the approval of the Supreme Court in the cases of: *Richardson v. Coleman* (1892), 131 Ind. 210, 29 N. E. 909, 31 Am. St. 429; *Keesier v. State* (1900), 154 Ind. 242, 247, 56 N. E. 232; *In re Darrow and Talbot* (1910), 175 Ind. 44, 58, 59, 92 N. E. 369. One of its statements may possibly be open to criticism, but when considered in its entirety, we do not think it contained any announcement that could be said to be prejudicial or harmful, to appellant's cause, and hence its giving did not, in any event, constitute reversible error.

Because of the error in giving instruction No. 1, the motion for new trial should have been sustained. The judgment is therefore reversed with instructions to the trial court to grant a new trial, and for further proceedings consistent with this opinion.

NOTE.—Reported in 102 N. E. 455. See, also, under (1) 6 Cyc. 602; (2) 6 Cyc. 611, 612; (3) 6 Cyc. 536, 538; (4) 6 Cyc. 612; (5) 29 Cyc. 634; (6, 8) 38 Cyc. 1629; (7) 38 Cyc. 1632; (9) 3 Cyc. 386; (10) 38 Cyc. 1815; (11) 38 Cyc. 1639, 1809; (12) 38 Cyc. 1626, 1627, 1632. As to proximate and remote causes of injury from negligence, see 50 Am. Rep. 569; 36 Am. St. 807; see, also, note to *Heney v. Dennis* (Ind.), 47 Am. Rep. 381. As to carrier's duty to give notice of starting of train, see 7 Am. St. 835. As to who are passengers and when they become such, see 61 Am. St. 75. As to negligence in starting street car with jerk, see 23 L. R. A. (N. S.) 891; 34 L. R. A. (N. S.) 225. For presumption of negligence from sudden start, stop, jolt, or jerk of car, see 13 L. R. A. (N. S.) 611; 29 L. R. A. (N. S.) 814. On the liability of

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a street car company for injury to alighting passenger by starting of car on signal of fellow passenger, see 27 L. R. A. (N. S.) 764; 37 L. R. A. (N. S.) 724; 21 Ann. Cas. 1331. As to the effect of signalling car to make one a passenger, see 13 L. R. A. (N. S.) 283; 25 L. R. A. (N. S.) 408.

FOOTE v. FOOTE.

[No. 8,095. Filed June 24, 1913.]

1. **APPEAL.—Questions Reviewable.—Briefs.—Sufficiency.**—On appeal from the sustaining of a motion to vacate a judgment, the statement in appellant's brief of the only two reasons on which the motion was based, although not appearing in the usual place and therefore not in strict accordance with Rule 22 of the Supreme and Appellate Courts, requiring a concise statement of so much of the record as fully presents every error and exception relied on, shows a good faith effort to comply with the rule and is sufficient to advise the court of the questions involved. p. 675.
2. **JUDGMENT.—Vacating Judgments.—Power of Courts.**—Any proceeding in a court is *in fieri* until the close of the term, so that courts have complete control of the record of their proceedings during the entire term at which such proceedings are had, and, during such term may, for good cause shown, correct, modify or vacate any of their judgments. p. 676.
3. **APPEAL.—Review.—Vacating Judgment.—Presumptions.**—It will be presumed on appeal that the trial court was correct in sustaining a motion to vacate a judgment, which showed sufficient cause for setting aside the same, in the absence of a showing that such judgment was vacated at a subsequent term. p. 676.
4. **JUDGMENT.—Motion to Vacate.—Sufficiency.**—Where, in a divorce proceeding, the court rendered judgment that neither party was entitled to a divorce and that each party pay his own costs, a motion to vacate the judgment on the ground that the court inadvertently rendered judgment without considering and passing upon the question of an allowance to plaintiff for her expenses including attorney fees in her defense to the cross-complaint, and to give her an opportunity to show the court that she is entitled to an allowance for such expenses, shows a good and sufficient cause for setting aside the judgment. p. 676.
5. **APPEAL.—Decisions Reviewable.—Order Vacating Judgment.—Record.**—Where, on a motion to vacate the judgment in a divorce

proceeding, the judgment was vacated and an order made directing that defendant pay to plaintiff a certain sum for her expenses and attorney fees, and the record fails to disclose that a final judgment was thereafter entered with respect to the issues joined on the pleadings, there was no final judgment from which an appeal could be had. p. 676.

6. APPEAL.—*Decisions Reviewable.—Order Vacating Judgment.*—An appeal does not lie from an order vacating a judgment. p. 677.

From Sullivan Circuit Court; *Wm. H. Bridwell*, Judge.

Action by Gertrude M. Foote against Wint A. Foote, for divorce. Judgment was rendered denying the divorce and that each party pay his own costs, and thereafter, on motion of plaintiff, the court vacated the judgment and entered an order requiring defendant to pay to plaintiff her expenses and attorney's fees, from which the defendant appeals. *Appeal dismissed.*

G. W. Buff, *W. P. Stratton* and *Wesley Forbes*, for appellant.

J. Hurley Drake, *Charles D. Hunt* and *Gilbert W. Gambill*, for appellee.

SHEA, J.—Action by appellee, Gertrude M. Foote, against appellant for divorce. Issues were formed by the complaint in two paragraphs, answer in general denial to each, a cross-complaint by appellant and an answer thereto in general denial. After hearing the evidence, the court found for appellant upon the complaint of appellee, and for appellee upon appellant's cross-complaint, and on May 8, 1911, rendered judgment that neither party was entitled to a divorce; that appellee take nothing by her complaint and appellant nothing by his cross-complaint and each party pay his own costs. On May 22, 1911, appellee filed her motion to vacate the judgment and permit her to make application for an allowance for expenses incurred in said action. Appellant objected to this motion for the reasons: (1) That the judgment was not inadvertently rendered by the court; (2) that final judgment was rendered on May 8,

1911, and motion to vacate was not filed until May 22, 1911; (3) no application for an allowance to appellee was pending or on file at the time the judgment was rendered. Appellee's motion was sustained, and the court rendered judgment vacating its former judgment and ordered appellant to pay appellee an additional allowance of \$175 for attorney's fees. Appellant moved the court to modify the foregoing judgment by striking out the order of court making the additional allowance, which motion was overruled.

The errors relied on for a reversal are: (1) The court erred in vacating the final judgment rendered in this cause; (2) in vacating the final judgment rendered, on insufficient reasons; (3) in overruling appellant's objections to appellee's motion to vacate the judgment; (4) in making an additional allowance to appellee for attorney's fees; (5) in overruling appellant's motion to modify and change the order and judgment making an additional allowance to appellee for attorney's fees.

Appellee earnestly insists that appellant has omitted

1. to set out in his brief a copy or the substance of appellee's motion to vacate the judgment; that this is not in compliance with Rule 22, clause 5 of this court, therefore the questions raised on this motion can not be considered. Appellant insists that not only is the substance of the motion set out in its brief, but the exact language of the only two reasons assigned in the motion for the vacation of the judgment is used. Appellant's brief contains this language: "For it will be observed that just two reasons were assigned for the vacation of the judgment: (1) 'That the court inadvertently rendered the judgment without considering and passing upon the question of an allowance to plaintiff for her expenses including attorney's fees in her defense to the cross-complaint'; and (2) 'For the purpose and in order that the plaintiff may have an opportunity and be permitted to move the court and show to the court that she is entitled to an allowance for expenses

incurred by her in defending against defendant's cross-complaint herein.' '' While this language does not appear in the usual place, and is therefore not in strict accordance with Rule 22, it shows a good faith effort to comply with said rule, and is sufficient to advise the court of the questions involved in this appeal, which has been held adequate. *Howard v. Adkins* (1906), 167 Ind. 184, 78 N. E. 665; *Indiana Union Traction Co. v. Heller* (1909), 44 Ind. App. 385, 89 N. E. 419.

The first three errors assigned, question the ruling of the court in sustaining appellee's motion to vacate the judgment. The theory of the law in this State is that

2. "courts have full and complete control of the record of their proceedings during the entire term at which such proceedings are had, and, during the term, the court may, for good cause shown, correct, modify, or vacate any of its judgments. Any proceeding in a court is *in fieri* until the close of the term." *Durre v. Brown* (1893), 7 Ind. App. 127, 34 N. E. 577. See, also, *Davis v. Davis* (1895), 141 Ind. 367, 375, 40 N. E. 803; *Burnside v. Ennis* (1873), 43 Ind. 411, 413. No showing is made in this

3. case that the judgment was vacated at a subsequent term of court. It is therefore presumed that the

4. conclusion of the trial court is correct. The reasons assigned in support of appellee's motion show a good and sufficient cause for setting aside the judgment, and under the authority vested in the trial court, no error was committed in sustaining said motion. In view of the conclusion reached by the court, the other errors argued by appellant need not be discussed.

The record discloses that the court, by order

5. duly entered, vacated a judgment theretofore rendered. The only order thereafter made is one directing that appellant pay to appellee \$175 for expenses and attorney's fees. The record fails to disclose that there

was any final judgment thereafter entered with respect to the issues joined upon the complaint and cross-complaint, therefore there was no final judgment from which appellant could properly appeal in the absence of a statute providing therefor. Section 671 Burns 1908, §632 R. S. 1881, provides: "Appeals may be taken from the circuit courts and superior courts to the supreme court, by either party, from all final judgments, except in actions originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars." See, also, *Thomas v. Chicago, etc., R. Co.* (1894), 139 Ind. 462, 39 N. E. 44, and authorities cited; *Champ v. Kendrick* (1891), 130 Ind. 545, 30 N. E. 635; *Taylor v. Board, etc.* (1889), 120 Ind. 121, 22 N. E. 108.

Both this and the Supreme Court have held that

6. an appeal does not lie from an order vacating a judgment. *Masten v. Indiana Car, etc., Co.* (1898), 19 Ind. App. 633, 49 N. E. 981; *Wehmeier v. Mercantile Banking Co.* (1912), 49 Ind. App. 454, 97 N. E. 558; *Barnes v. Wagener* (1907), 169 Ind. 511, 82 N. E. 1037; *Neyens v. Flesher* (1907), 39 Ind. App. 399, 79 N. E. 1087; *Randolph v. City of Indianapolis* (1909), 172 Ind. 510, 88 N. E. 949; *Reese v. State* (1856), 8 Ind. 416. In the case of *Neyens v. Flesher, supra*, this language is found: "No matter how clearly and decisively the entries in the record may indicate what the ultimate judgment or the sentence of the law when pronounced will be, until it is so pronounced there is no judgment. Even though the court has fully found the facts and stated the conclusions of law, or the jury has returned a complete verdict which has been accepted and filed, neither of these acts will constitute a judgment. * * *

A final judgment is one that at once disposes of all the issues, as to all parties, involved in the controversy presented by the pleadings, to the full extent of the power of

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the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such issues.” (Citing many authorities.)

In view of the record as above set out, the appeal is dismissed.

NOTE.—Reported in 102 N. E. 393. See, also, under (1) 2 Cyc. Anno. 1013; (2) 23 Cyc. 860, 901; (3) 3 Cyc. 322; (4) 23 Cyc. 925, 949; (5) 2 Cyc. 586; (6) 2 Cyc. 600. As to the power of court to vacate divorce decrees, see 60 Am. St. 656.

TOWN OF JASPER v. CASSIDY.

[No. 3,620. Filed June 24, 1913.]

1. **APPEAL.—Waiver of Error.—Briefs.**—Alleged error in stating the conclusions of law is waived by appellant's failure to set out in the brief either the finding of facts or the substance thereof, but where appellee's brief contains a statement of the facts which, when considered with those shown by appellant's brief, are sufficient to enable the court to know the principal and controlling question in the case, the same may be considered. •p. 679.
2. **MUNICIPAL CORPORATIONS.—Public Improvements.—Streets.—Assessments Against Abutting Property.—Statutes.**—Neither the provisions of the cities and towns act of 1905 (Acts 1905 p. 219, §§107, 108, 265) relating to the improvement of streets and the assessment of the cost against abutting property, nor of the act of 1909 (Acts 1909 p. 412) amending said sections in certain particulars, authorize the assessment of abutting property for the improvement of a street by grading only, but clearly contemplate grading and paving with some kind of modern paving material, so that by the one proceeding and assessment there shall be a complete and finished improvement. p. 680.
3. **STATUTES.—Construction.—Subsequent Enactments.—Presumptions.**—The legislature is presumed to be acquainted with existing laws, and, in legislating on any subject, to have the same in view, and to take cognizance of the construction placed on any statute by the courts of last resort. p. 680.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Proceedings by the town of Jasper for the improvement of a certain street by grading only. From a judgment in

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favor of Lizzie T. Cassidy on her appeal from the assessment against her property, this appeal is prosecuted. *Affirmed.*

Bomar Traylor, for appellant.

Horace M. Kean and *Richard M. Milburn*, for appellee.

FELT, J.—This case was transferred to this court from the Supreme Court. The appellee appealed to the Dubois Circuit Court from an assessment of benefits made by the board of trustees of the town of Jasper, Indiana, against a lot owned by her in said town. From a finding and judgment in favor of appellee, this appeal is prosecuted and the only error assigned is that the court erred in its conclusions of law stated on the finding of facts made at the request of the parties.

The appellant has not set out in its brief the find-

1. ing of facts nor stated the substance thereof. Under the rules of this court and numerous decisions, the error, if any, is thereby waived. However, appellee in her brief, has stated facts which considered with those shown by appellant's brief enable the court to know that the principal and controlling question in the case, is whether the town board has power under the statute to order a street graded, without otherwise improving it, and to assess the cost thereof against abutting property.

The original declaratory resolution was passed by the board of trustees of the town of Jasper on June 21, 1909. Appellee appeared before the board and duly remonstrated on the ground of (1) insufficient notice; (2) that her property would not be benefited, but would be damaged by the proposed grading to the extent of \$125; (3) that the contract included work not contemplated by the declaratory resolution; (4) that the work was negligently done and not completed according to specifications; (5) that the whole proceeding is void because there is no law authorizing the board to grade streets and assess the cost thereof to the

abutting property unless by the same proceeding the street is to be paved with some kind of modern paving material.

The law of 1889 (Acts 1889 p. 237, §4288 Burns

2. 1901) authorized streets to be “graded and paved”

and it was held that the statute did not empower municipal authorities to pass and enforce an ordinance for the grading of a street without paving it, and charge the abutting property with the cost of such improvement. *Taylor v. Patton* (1903), 160 Ind. 4, 66 N. E. 91. The foregoing decision is decisive of the question presented here unless subsequent enactments have changed the law.

The legislature is presumed to be acquainted with

3. existing laws and in legislating on any subject to

have the same in view and to take cognizance of the construction placed on any statute by the courts of last resort. 2 Lewis' Sutherland, Stat. Constr. (2d ed.) §§355, 499; *City of Rushville v. Rushville Natural Gas Co.* (1892), 132 Ind. 575, 581, 28 N. E. 853, 15 L. R. A. 321. The

Cities and Towns Act of 1905 (§§107, 108, 265 Acts

2. 1905 p. 219, §§8710, 8711, 8959 Burns 1908) does

not authorize the assessment of abutting property for grading only, but clearly contemplates grading and paving with some kind of modern paving material, so that by the one proceeding and assessment there shall be a complete and finished improvement. The act of 1909 (Acts 1909 p. 412) amended the foregoing sections in certain particulars. Section 1 provides: “Whenever the board of public works shall desire to improve a street, alley, or other public place in said city, in whole or in part, with one of the kinds of modern pavements, said board shall adopt a preliminary resolution for such improvement. Said board shall at the same time adopt and place on file general details, drawings and general specifications for such work * * * and for the foundation of the pavement proposed to be laid * * * suitable for use in connection with the wearing

surface of any of the kinds of modern city pavements.” The section makes further provision for the property owners to select “some kind of pavement other than those originally designated” and later on authorizes the board to make a final order “fixing the kind of pavement to be laid.” The act further provides that: “If said board shall desire to gravel or macadamize one of the streets of said city, or to improve one of said streets otherwise than by paving with one of the kinds of modern city pavements, or to improve any sidewalk, and to assess the cost thereof against the property specially benefited thereby, said board shall proceed in accordance with the provisions of this section: *Provided*, That in such case said board shall not be required to adopt several sets of specifications, but in lieu thereof, said board at the time of the adoption of the preliminary resolution for said improvement, shall adopt complete plans and specifications for said work with such material as it may select.” These provisions clearly indicate that some kind of wearing surface is to be used in every improvement, where the abutting property is to be assessed with the cost of such improvement, and we find nothing in the amended sections indicating any intention on the part of the legislature to authorize municipalities to improve either a street or sidewalk by grading only, and assess the cost thereof to the abutting property. The language of the act of 1909 is different from that of the act of 1889, but there is no mention of an improvement by grading only, or any language indicating an intention on the part of the legislature to change the rule declared by the Supreme Court in construing the former act. Independent of the decision, however, we think the act of 1909, clearly indicates that abutting property is to be charged only with the cost of complete improvements authorized by the statute, including some kind of pavement or wearing surface selected or ordered as provided in the act.

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As the law did not warrant the assessment of appellee's property for grading only, the court did not err in its conclusions of law and the judgment is therefore affirmed.

NOTE.—Reported in 102 N. E. 278. See, also, under (1) 2 Cyc. 1013, 1014; (2) 28 Cyc. 1109; (3) 36 Cyc. 1146. As to rules for construing statutes, see 12 Am. St. 827. As to liability of town for change, etc., of street grades, see 30 Am. St. 835; 43 Am. Dec. 723. As to charging expense of grading for sidewalk upon abutting owner, see 28 L. R. A. 946.

WATT, ADMINISTRATRIX, v. MISHAWAKA PAPER AND PULP COMPANY.

[No. 7,732. Filed November 26, 1912. Rehearing denied January 30, 1913. Transfer denied June 24, 1913.]

1. **NEGLIGENCE.—Trial.—Directing Verdict.**—Where the issuable fact is one of negligence, it is the duty of the trial court to direct a verdict for defendant, if the evidence fails to establish one or more of the facts essential to a right of recovery. p. 684.
2. **TRIAL.—Directing Verdict.—Evidence.**—Where there is no dispute as to the facts involved, nor as to the inferences that may be properly drawn therefrom, the court should direct a verdict; but if any facts are made to appear from the evidence about which reasonable and fair minded men might differ, the case should be submitted to the jury. p. 684.
3. **MASTER AND SERVANT.—Injuries to Servant.—“Laborer.”—Unguarded Machinery.**—Under evidence showing that decedent, although having a certain control over the laborers in defendant's mill, was hired as a millwright and general utility man, that he looked after the machinery and made necessary repairs, subject to the directions of defendant's secretary, treasurer and manager, and that it was his business to make the particular repair he was attempting at the time of his injury and death, decedent was a “laborer” within the meaning and intent of §8029 Burns 1908, Acts 1899 p. 231, §9, relating to the guarding of machinery. p. 687.
4. **MASTER AND SERVANT.—Injuries to Servant.—Unguarded Machinery.—Belts.**—In an action for the death of a servant, evidence showing that he fell upon an unguarded belt and was thereby carried and hurled to the floor and killed, that employes of defendant in performing their work were frequently required to be about the unguarded belts and pulleys, that such belt could have been guarded so as to protect employes required to work

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above same, and without affecting its efficiency, that it was customary for decedent and others to work above such belt in oiling machinery, and that such belt was dangerous, should have gone to the jury as tending to show negligence on the part of defendant in failing to properly guard such belt in compliance with §8029 Burns 1908, Acts 1899 p. 231, §9. p. 688.

5. MASTER AND SERVANT.—*Injuries to Servant.—Proximate Cause.—Question for Jury.—Evidence.*—In an action for the death of a servant in falling from a ladder on which he was working onto an unguarded belt, whereby he was carried and hurled to the floor and killed, where there was evidence tending to show that the belt could have been so guarded as to prevent him from falling thereon, and if such a guard had been present he would not have been hurt by the fall, the question of whether the slipping of the ladder, or the unguarded belt, or both, was the proximate cause of the death, should have been submitted to the jury under proper instructions. p. 689.
6. MASTER AND SERVANT.—*Injuries to Servant.—Question for Jury.—Contributory Negligence.*—In an action for the death of a servant who fell from a ladder on which he was standing, while attempting to remove a defective shaft, onto an unguarded belt whereby he was carried and hurled to the floor and killed, where there was evidence showing a custom in defendant's factory not to stop machinery to make repairs unless absolutely necessary, and from which it might reasonably be inferred that such custom originated with the manager, and showing that the manager, knowing that decedent was about to attempt the work while the belts and pulleys below were in motion, did not forbid him to do so, and that it was a custom for defendant's servants to perform similar services while such belts and pulleys were in motion, the question of whether decedent was guilty of negligence contributing to his injury was for the jury. pp. 690, 692.
7. NEGLIGENCE.—*Reasonable Care.—Question for Jury.*—Reasonable care is such care as a reasonably prudent person would use under the circumstances of the particular case, and whether under given circumstances and conditions a person used reasonable care, or was guilty of contributory negligence, is generally for the jury under proper instructions. p. 691.

From Laporte Circuit Court; *John C. Richter*, Judge.

Action by Mary Watt, administratrix of the estate of Henry Watt, deceased, against the Mishawaka Paper and Pulp Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Hickey & Wolfe and *Parks & Parks*, for appellant.

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Frank E. Osborn, Wm. A. McVey and Lee L. Osborn, for appellee.

IBACH, C. J.—Appellant as administratrix sued appellee to recover damages on account of the death of her husband, Henry Watt, alleged to have been caused by appellee's failure to properly guard a certain belt situated in its factory. There was a single paragraph of complaint, and after a demurrer thereto had been overruled, the issues were joined by an answer in general denial. There was a trial by jury, and at the close of all the evidence the court upon motion of appellee directed the jury to return a verdict in its favor, and upon such verdict judgment was rendered.

The error assigned for reversal is based on the action of the trial court in overruling appellant's motion for a new trial, and the sole specification discussed and presented for our consideration is that the court erred in sustaining appellee's motion to direct the jury to return a verdict for appellee. It is the duty of a trial court to direct a

1. verdict for the defendant where the issuable fact is one of negligence, and where the evidence fails to
2. establish one or more of the facts essential to a right of recovery. In all cases where there is no dispute as to the facts involved and no dispute as to the inferences which may be properly deduced therefrom, the court should direct a verdict. But whatever may be the nature of the action, the trial court cannot direct a verdict if any facts are made to appear from the evidence about which reasonable and fair minded men might honestly differ. All such cases must be submitted to the jury. 6 Thompson, Negligence §7393; *Binford v. Johnston* (1882), 82 Ind. 426, 42 Am. Rep. 508; *Diezi v. G. H. Hammond Co.* (1901), 156 Ind. 583, 60 N. E. 353; *Gregory v. Cleveland, etc., R. Co.* (1887), 112 Ind. 385, 14 N. E. 228. This brings us to a consideration therefore not only of the evidence most favorable to appellant, but also to a consideration of all the reasonable inferences which the jury would be justified in

drawing therefrom. If it can then be said that the cause of action declared on has been fairly made out, the appellant is entitled to a reversal of this cause, otherwise the action of the trial court will be upheld.

The undisputed evidence shows that appellee on August 8, 1905, was operating a paper mill in the city of Mishawaka, Indiana. Its machine room was about one hundred feet in length north and south, and about twenty-eight feet in width east and west. In this room were situated the various kinds of machinery used in the manufacture of paper. Some six or seven feet from the east wall of this room and extending nearly the whole length thereof was a shaft which operated two fans. This shaft was nine or ten feet from the floor, and was supported by hangers bolted to timbers which were fastened to trusses. This shaft was put up in sections sixteen or eighteen feet long, which sections were joined together by sleeve couplings. Some six feet below this shaft were three belts which moved on pulleys located about six inches above the floor. These belts ran north and south, two ten-inch belts running side by side, and the third, a longer one, extending south beyond the other two. These belts while operating the machinery moved at a rapid rate, and above or about them and the pulleys, there was no guard of any kind. They could have been guarded without interfering with their usefulness, by the construction of a frame work about and over them which would protect persons whose duties required them to be about and near to these belts and pulleys. Between the east wall of the room and the east belt there was a space of four feet and six inches, and between the east wall and west belt there was a space of six feet. The space between the wall and the east belt was used by the workmen as a passage way, and for the purpose of oiling and repairing the machinery. The factory was in operation night and day. In the afternoon of each day the paper machine was "washed up," but the machinery was kept in motion while this process was going on. The

machinery, including the shafting operated by the belts above described, was oiled while they were in motion, and was never stopped for repairs except when they could not otherwise be made. On the morning of August 8, 1905, a section of the long shaft situated above the two ten-inch belts above mentioned, and which operated the fans, was broken and had to be removed for repairing. The stopping of the fans made it intensely hot above the machines. To make this repair decedent had with him his assistant, Woollet, and when the making of the repairs was suggested to Woollet by decedent, he called decedent's attention to the danger of removing the broken portion of the shaft while the belts and pulleys below were revolving, and in this connection decedent remarked, "the old man (referring to the manager or superintendent) will raise hell if we shut down, and I guess we can do it by being careful." Witness Woollet testified that it was necessary to oil the machinery and bearings of this shaft over both belts frequently, and in order to oil them he had to use, and it was the custom of both decedent and witness to use, a ladder resting upon the shaft above and the floor below, and the only way repairs could be made on the shaft was to take it down by means of a ladder, which would necessitate the placing of the ladder over these two belts, that workmen had to pass around these belts sometimes as often as once each day, and sometimes every two or three hours to attend to the belts and pulleys, and it was necessary also for witness or decedent to go about them to oil the machinery and make repairs. Witness Delcamp testified that the men worked all over this room. On the morning of August 8, 1905, witness Woollet, at the suggestion of decedent procured a fourteen-foot ladder, carried it to the rear of the paper machine, followed by decedent, and placed it up to and against the shaft, for the purpose of removing the broken section to repair and replace it. Woollet mounted the ladder, threw a rope over the truss, made it fast to the broken part of the shaft so as to hold it when

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loosened, and decedent held the rope. In this manner he removed one portion of the broken section. He then removed the ladder and began to remove the other portion of the broken section in a similar manner, but becoming tired, he came down the ladder, whereupon decedent called to him to hold the rope, and he ascended the ladder, which was over the revolving belts and pulleys, and with a wrench unfastened the sleeve coupling which held the part of the broken section of the shaft to the remainder of the shaft, and immediately the ladder slipped and turned at the opening thus made in the shaft, and though the ladder did not fall, one side of it slipped off the shaft and decedent fell astride the west or inside belt and was carried backwards by it and thrown on his head on the cement floor, killing him instantly. The witness Miller, manager for appellee, testified that it was not practicable to stop machinery while manufacturing paper. Referring also to removing the broken portion of the shaft while the belts beneath were in motion, this witness testified that he said to decedent, "You had better shut down or better wash up, and have the shaft taken down, and in case you have to shut down it will be ready to put up." Decedent then said, "I believe I can take the shaft down with the machinery running." Witness said, "Henry, (deceased) it can be done, but you have got to be awful careful about those belts."

Appellant's argument is that this evidence was sufficient to establish her right to recover, and therefore the case should have been submitted to the jury under proper instructions. Appellee contends, first, that decedent was not a laborer within the meaning of the statute, that he was acting as superintendent or foreman of the factory and was not entitled to the protection afforded to laborers. The

evidence shows, that although Watt had a certain

3. control over the laborers in the mill, yet he was hired as a millwright and general utility man, ran the engine, looked after the machinery, and made necessary re-

pairs, and the witness Miller, appellee's secretary, treasurer, and manager, testifies that Watt worked under his direction, that it was his business to repair the machinery, and was his business to repair the particular shaft on which he was engaged when he met his death. We are inclined to hold that when all the duties required of decedent are considered in the light of the evidence, that he was a laborer within the meaning and intent of the statute. *Indianapolis, etc., Traction Co. v. Brennan* (1910), 174 Ind. 1, 87 N. E. 215, 90 N. E. 65, 90 N. E. 68, 91 N. E. 503, 30 L. R. A. (N. S.) 85.

The point is also made by appellee that the belt
4. in question was not such as is specifically designated by the statute to be guarded. In the case of *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290, 301, 75 N. E. 270, referring to §8029 Burns 1908, the Supreme Court said: "What evidently was intended or contemplated by the legislature was that those parts of the machinery which were dangerous to employes whose duties required them to work in the immediate vicinity of such dangerous machinery should be properly guarded." The question involved in this contention then is, Does the evidence show that this belt was one about which decedent or any of the workmen of the mill were required to go, in the performance of their work? Much evidence on this point has been already set out, including that of the witness Woollet that the employes in performing their work were frequently required to be about the unguarded belts and pulleys, and that the belts and pulleys could have been guarded so as to protect an employe who was required to work above it, and that it was usual and customary for him and decedent to work above it in oiling machinery. There is evidence that the unguarded belt in question was dangerous, that workmen were required to go about it, and that it could have been guarded without affecting its efficiency, and we hold that this evidence tends to show negligence on the part of appellee in failing to properly guard it, and should have gone to the jury.

It is next argued by appellee that even if it was
5. negligent in failing to guard the belt, yet such negligence was not the proximate cause of Watt's death, that even if the belts and pulleys had been properly guarded, (or even if there had been no belts and pulleys beneath the ladder) "such would not have prevented the deplorable death of Mr. Watts, precisely in the manner in which it occurred." Again referring to the witness Delcamp, we find that in addition to what has been quoted, he says that the belts and pulleys could have been guarded by constructing a frame work that would go over both belts and pulleys, with posts on the outside fastened to the floor, the sides braced and a cover placed on top. It seems to us that from this evidence together with all the other evidence in the case, the jury might very properly have concluded that if the belts and pulleys had been so guarded that his fall upon the belts would have been prevented, and that he would not by them have been thrown upon the cement floor and killed, that if such a guard had been present, he would have been unharmed by the fall. There is also evidence tending to show that he was pulled off the ladder when it slipped, by his feet coming in contact with the belt beneath. Again if such an accident was likely to happen by reason of the failure to guard the belt and pulley, appellee was bound to use every reasonable effort to prevent it. In the case of *Balzer v. Waring* (1911), 176 Ind. 585, 593, 95 N. E. 257, the Supreme Court said, "Proximate cause is the act that immediately causes, or fails to prevent, an injury that might reasonably have been anticipated would result from the negligent act or omission charged, and without which such injury would not have occurred. The test is to be found in the probably injurious consequences that were to be anticipated, and not in the number of subsequent events or agencies that might arise to bring about such consequences." We think that the facts proven at the trial at least tend to

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show that the identical accident which did happen was one which appellee might reasonably have anticipated would have occurred. In the case of *Cincinnati, etc., R. Co. v. Acrea* (1908), 42 Ind. App. 127, 133, 82 N. E. 1009, this court said: "In determining proximate cause, the inquiry is directed to the responsible cause, without reference to whether it is the first or last in the succession of events that resulted in the plaintiff's injury." So it occurs to us that a jury trying this cause might under all the evidence correctly find that if the belt and pulley had been guarded in the manner described by witness Delcamp, decedent would not have been killed. But whether it was the absence of the guard, or the slipping of the ladder, or both, which constituted the proximate cause of the death, was, under the evidence in this case, a question to be submitted to the jury under proper instruction. *Indiana Union Traction Co. v. Keiter* (1911), 175 Ind. 268, 92 N. E. 982.

We come now to the consideration of the last argu-

6. ment of appellee to support the action of the trial court, namely, that decedent did not use reasonable care in attempting to remove the defective portion of the shaft. Again we find that the evidence shows that it was the custom of the operators of appellee's factory not to stop the machinery to make repairs unless absolutely necessary, and whether this custom was originated by decedent or by Miller, the manager, was a matter for the determination of the jury. At least there is evidence from which the reasonable inference might be drawn that it originated with Miller, for Miller himself testified that if the machinery was stopped all the men in the factory would be idle, and the machinery was not shut down for repairs if it was possible to avoid it. The evidence at least tends to show that decedent knew of this custom and that such was the desire of the owners of the mill. The evidence further reveals that decedent as well as the manager realized the danger of doing this repair work on the shaft and yet both believed

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it could be done by being careful without stopping the machinery, and the manager, although knowing that decedent was about to make the needed repair by climbing above the moving belts did not forbid him to make it while the machinery was running. So far as any inference may be drawn from all the evidence on this branch of the case, it is fair to say that it was the custom for appellee's servants to perform similar services, while the belts and pulleys involved here were in motion.

The case of *Stephens v. American Car, etc., Co.* (1906), 38 Ind. App. 414, 418, 78 N. E. 335, is one very similar to the case at bar, and in that case, considering a similar proposition, the court said, "All that was required of appellant was that he should use reasonable care. If he was guilty of contributory negligence it was only because he attempted to make the adjustment when the machine was running. Appellant testified that it was not necessary to stop the machine to change the screw. So far as any inference may be drawn from the evidence, it was the custom to make such adjustment while the machine was running." See, also, *Pittsburgh, etc., R. Co. v. Lightheiser* (1907), 168 Ind. 438, 78 N. E. 1033; *Davis Coal Co. v. Polland* (1902), 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319; *Espenlaub v. Ellis* (1904), 34 Ind. App. 163, 72 N. E. 527. In the consideration of similar cases, the courts have uniformly held that in order to determine whether the injured party has been guilty of contributory negligence, it must first be discovered from the evidence whether he exercised reasonable care for his own safety at, and immediately prior to his injury.

7. What is meant by reasonable care is only such care as a reasonably prudent person would use under the circumstances of the particular case, and whether under given circumstances and conditions a person used reasonable care, or was guilty of contributory negligence, is generally left to the jury under proper instruction.

Appellee contends that the evidence shows that

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there was a safe way to do the work required, that

6. decedent chose an unsafe way, and that he was guilty of contributory negligence in choosing the dangerous way when a safer way was open to him. In the case of *Jenney Electric Mfg. Co. v. Flannery* (1913), ante 397, 98 N. E. 429, this court said, "the fact that the servant chose a dangerous way provided by the master, instead of a safe way or a safer way also provided, is not conclusive upon the question of contributory negligence. * * * This fact should be considered by the jury as bearing upon that question in connection with all the other facts and circumstances tending to prove or disprove due care." Under the evidence before us men of reasonable minds might honestly differ as to whether Watt was guilty of contributory negligence in going upon the ladder and attempting to take down the broken section of the shaft, or whether he used due care in so doing, therefore the question of decedent's negligence was one for the jury. This is especially true since all the evidence in the case is oral, and the burden of this issue is upon the defendant. Furthermore, this question is to be determined from all the evidence in the case, not from mere fragments, and from that evidence it is made to appear without contradiction that the machinery in the mill was run day and night, that oiling was done when the machines and shafting were in motion, that, appellee having so directed, repairs were always made without closing down the machinery if possible, because, as one witness stated, "it is not practicable to stop machinery which manufactures paper," and the manner used in taking down the shaft was in no essential different from the manner used every day in oiling it.

The court erred in directing the jury to return a verdict for defendant, and for this error the cause must be reversed, and remanded for new trial.

Judgment reversed.

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NOTE.—Reported in 99 N. E. 1029. See, also, under (1) 29 Cyc. 627; (2) 38 Cyc. 1565; (3) 26 Cyc. 1134; (4) 26 Cyc. 1463; (5) 26 Cyc. 1460; (6) 26 Cyc. 1482; (7) 29 Cyc. 640. As to instructions by court on matters of fact, see 14 Am. St. 36. As to master's duty to guard or enclose dangerous machinery, see note to *Brazil Block Coal Co. v. Gibson* (Ind.), 98 Am. St. 299. As to the question of contributory negligence being one for the jury, see 8 Am. St. 849. As to what is comprehended in expression "machinery of every description" in statutes imposing duty on master as to placing guards, see 30 L. R. A. (N. S.) 36. For common practice as the measure of master's duty to guard machinery, see 16 L. R. A. (N. S.) 140.

KINMORE v. CRESSE.

[No. 7,957. Filed June 25, 1913.]

1. **NEGLIGENCE.—Injuries to Travelers on Highway.—Complaint.—Allegations.—Contributory Negligence.**—A complaint in a negligence case alleging that plaintiff was traveling in a buggy driven by her uncle upon a public highway, that she saw defendant approaching behind them in an automobile, and that when the machine was about 300 or 400 feet distant plaintiff requested her uncle to stop the horse so she could get out, and while getting out she signalled defendant to stop the automobile, which was then about 200 feet away and running slowly, and that plaintiff had crossed the highway and was standing on the other side off the traveled part, when defendant negligently ran the automobile against her, is not open to the objection that it leaves an inference of contributory negligence on plaintiff's part. p. 695.
2. **NEGLIGENCE.—Complaint.—Sufficiency.**—A complaint showing that defendant owed the plaintiff a duty and containing a general charge of the negligent failure to discharge that duty, which resulted in the injury complained of, is sufficient to withstand a demurrer. p. 695.
3. **PLEADING.—Certainty.—Motion to Make Specific.**—Where a motion to make more specific might properly have been sustained, it is not reversible error to overrule it, if the pleading is sufficiently specific to make apparent the precise nature of the charge the defendant is called upon to meet and defend. p. 696.
4. **NEGLIGENCE.—Complaint.—Ruling on Motion to Make Specific.**—In an action for injuries to plaintiff by the defendant's automobile, where the complaint specifically stated the position of the parties, what was done by each and the result, and charged that the automobile was in the possession and control of defendant and was by him negligently run against plaintiff "in a manner

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unknown to her", the overruling of a motion to make the complaint more specific was not erroneous, since it is evident from the averments that the details called for relate to matters about which defendant must have had better knowledge than the pleader. p. 697.

5. **APPEAL.—Review.—Instructions.**—No reversible error is shown in the giving or refusing of instructions, where the instructions given, when considered as a whole, fairly and fully state the law applicable to the issues and evidence, and those refused, in so far as applicable and correct, were covered by those given. p. 698.

From White Circuit Court; *James P. Wason*, Judge.

Action by Melissa E. Cresse against Thomas Kinmore. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Palmer & Carr and *R. R. Cummings*, for appellant.

Addison K. Sills, Jr., and *Sills & Million*, for appellee.

FELT, J.—Suit by appellee against appellant to recover damages for injuries sustained by being struck by an automobile owned and operated by appellant. The complaint was in one paragraph. Appellant's demurrer thereto was overruled, as was also his motion to make more specific. Answer in general denial. Trial by jury, finding and verdict for appellee. Appellant's motion in arrest of judgment was overruled. Judgment rendered on the verdict. Appellant's motion for a new trial was also overruled. Appellant assigns as errors the overruling (1) of his demurrer to the complaint; (2) his motion to make more specific; (3) his motion in arrest of judgment; (4) his motion for a new trial.

In substance, the complaint alleges that appellee in August, 1909, was traveling in a buggy drawn by a horse, driven by her uncle Enos Nice, upon a public highway running east and west in Princeton Township, White County, Indiana; that while so traveling, she saw appellant and another gentleman coming behind them in an automobile and traveling in the same direction; that when the automobile was about three or four hundred feet distant, appellee re-

quested Nice to stop the horse that she might get out of the buggy, which he did, stopping on the south side of the highway; that while in the act of getting out of the buggy, appellee signalled appellant to stop the automobile, which was running at a very low rate of speed, and was then about two hundred feet away; that appellee started across the highway immediately, and had crossed it and was standing off at the north side, and off the traveled part of the highway, when appellant, who was then in possession and control of the same, carelessly, negligently and recklessly, in a manner unknown to appellee, ran said automobile toward and against her, thereby knocking her down and injuring her.

It is urged that the complaint is insufficient because it does not directly allege any acts or omissions on the part of appellant, constituting negligence; that the facts

1. averred leave an inference of contributory negligence on appellee's part, as the complaint discloses that she left the buggy (a place of safety) without necessity, and moved across the highway to a place of danger. The complaint is not subject to the criticism of raising an inference of contributory negligence on the part of appellee. True, it is averred she got out of the buggy but it is also charged that she had crossed the highway and was standing at the side thereof when struck by the automobile. For this reason, the rule announced in *Baltimore, etc., R. Co. v. Abeg-gelen* (1908), 41 Ind. App. 603, 606, 84 N. E. 566, even if correct, has no application here. It has been uniform-

2. ly held in this State that a general allegation of negligence is sufficient to withstand a demurrer for want of facts, unless the contrary appears from the specific facts averred. The complaint in this case shows that appellant owed a duty to appellee and contains a general charge of the negligent failure to discharge that duty which resulted in the injury of which the plaintiff complains. This is sufficient to withstand the demurrer. *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 97 N. E. 822; *Louisville,*

etc., *R. Co. v. Bates* (1897), 146 Ind. 564, 566, 45 N. E. 108; *Rogers v. Baltimore, etc., R. Co.* (1898), 150 Ind. 397, 403, 49 N. E. 453.

It is next insisted that the court erred in overruling appellee's motion to make the "complaint more specific so as

to show how and in what manner the defendant ran

3. and operated the automobile" and "in what the

alleged carelessness and negligence of the defendant consisted in the use of said automobile * * * by reason

of which the plaintiff was injured." In *Pittsburgh, etc., R.*

Co. v. Simons (1907), 168 Ind. 333, 79 N. E. 911, on page

339, our Supreme Court said: "It has often been held by

this court that a general charge of negligence is sufficient

as against a demurrer, but if a defendant desires a more

specific charge he is entitled to it upon motion, if made in

due season. But the rule has its limitations. A plaintiff

is required to charge his cause of action in direct and certain

terms, yet he is not required to go into an elaboration of

details beyond what is reasonably necessary, fully and dis-

tinctly to inform the defendant of what he is called upon to

meet. *Alleman v. Wheeler* (1885), 101 Ind. 141. * * *

The maintenance and operation of an unblocked switch

knowingly at a much-frequented place, and knowingly back-

ing a train over the place without looking ahead of the

moving cars, constitute the negligent acts complained of, and

we are at a loss to see how an amplification of details, beyond

what is given in the complaint, could increase the defend-

ant's knowledge, or strengthen it in the preparation of its

defense. We, therefore, think the court did not err in over-

ruling the defendant's motion to make the complaint more

specific." Where the motion to make more specific might

properly have been sustained, it is not reversible error to

overrule it, unless by so doing the defendant is deprived of

some substantial right by the failure of the pleading to fully

and specifically disclose to him the character of the charge

made against him. If the pleading is sufficiently specific

to make apparent the precise nature of the charge, the defendant is called upon to meet and defend, he is not harmed by overruling such motion. *Trayser Piano Co. v. Kirschner* (1880), 73 Ind. 183; *Lewis v. Albertson* (1899), 23 Ind. App. 147, 151, 53 N. E. 1071; *American Fire Ins. Co. v. Sisk* (1894), 9 Ind. App. 305, 309, 36 N. E. 659; *Ohio, etc., R. Co. v. Craycraft* (1892), 5 Ind. App. 335, 32 N. E. 297;

Elliott, App. Proc. §665. The complaint in this case

4. specifically states the position of the parties, what was done by each and the result. Furthermore, it is charged that the automobile was in the possession and control of appellant and was by him negligently run against appellee "in a manner unknown to her", while she was standing on the north side of the highway. In *Tipton Light, etc., Co. v. Newcomer* (1901), 156 Ind. 348, 352, 58 N. E. 842, it was held that the defendant had the right to have "the plaintiff to state specifically the facts constituting alleged negligence, where it is not done, and no sufficient excuse is disclosed for such failure." In addition to the averment that she did not know the manner in which the automobile was run, the facts alleged show that the particular details relating to the condition and operation of the automobile, in all probability, were unknown to appellee and known to the appellant. While particular cases may be found where a very strict application has been made of the rule requiring specific averment of the details entering into the acts, omissions or conditions constituting the alleged negligence, yet the reason of the rule must always be considered in deciding any particular case. The rule is intended to subserve the purpose of giving the defendant full and definite information in regard to the charge made against him, and where, as in this case, he was fully informed by the averments of the complaint, no good purpose could have been subserved by sustaining the motion, and no harmful error was committed in overruling it. It is difficult to see in what respect any additional detailed state-

ment of the acts or omissions which constituted the alleged negligence could add to appellant's knowledge of the transaction, and the charge made against him or aid him in his defense. §385 Burns 1908, §376 R. S. 1881; *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99. In *Gerard v. Jones* (1881), 78 Ind. 378, the principle was announced that the rule requiring definite and specific averment of facts is not to be strictly enforced in reference to details where the general averments clearly show the gist of the charge against the defendants and the details called for relate to matters about which it is evident, they must have had better knowledge than the pleader.

Objection is made to some of the instructions given by the court and to the refusal to give certain instructions tendered by appellant. We have carefully examined the instructions and find no question of sufficient importance to justify the extension of this opinion by a detailed discussion of the questions suggested. The instructions given, when considered as a whole, fairly and fully state the law applicable to the issues and evidence. Those tendered and refused, in so far as applicable and correct, were covered by those given. There was no error in overruling the motion in arrest of judgment or for a new trial. The case seems to have been tried fairly and impartially and we find no error prejudicial to appellant.

Judgment affirmed.

NOTE.—See, also, under (1) 29 Cyc. 578; (2) 29 Cyc. 569; (3) 31 Cyc. 646, 669; (5) 38 Cyc. 1711, 1778. As to sham pleadings and the relief obtainable against them, see 113 Am. St. 639. As to the rights and duties of persons driving automobiles in highways, see 13 Ann. Cas. 463; 21 Ann. Cas. 648.

Chicago, etc., R. Co. v. Daun—53 Ind. App. 699.

**THE CHICAGO, LAKE SHORE AND SOUTH BEND RAIL-
WAY COMPANY v. DAUN, ADMINISTRATOR.**

[No. 7,914. Filed May 8, 1913.]

From Porter Circuit Court; *W. C. McMahan*, Judge.

Action by Herman Daun against The Chicago, Lake Shore and South Bend Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

F. J. Lewis Meyer, for appellant.

Grant Crumpacker, William Daly and Watson & Treuthart, for appellee.

IBACH, C. J.—Appellee as administrator recovered \$1000 damages for the negligence of appellant in causing the death of Florence Langman, his decedent. The case is a companion to *Chicago, etc., R. Co. v. Daun* (1913), *ante* 382, between the same parties, in which appellee recovered as administrator of the estate of Edward Langman deceased. Edward and Florence Langman were husband and wife, and were killed by appellant's car while driving in a buggy over a highway crossing. The causes were consolidated for trial below, and the records are precisely the same, the same interrogatories asked and the same answers returned in both cases, while the same error is assigned here. The only difference in the situation of the parties is that Edward Langman was driving the horse at the time of the collision. The questions presented by this appeal are fully decided in the case of *Chicago, etc., R. Co. v. Daun* (1913), *ante* 382, 101 N. E. 731, and upon the authority of that case the judgment is affirmed.

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[NOTE.—The citation *State, ex rel. v. Quill*, 495, 498 (4), indicates that the case begins on page 495, the point cited is on page 498, and that such point is numbered 4 in the margin.—REPORTER.]

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1. *Naturalization.—Fees.—Statutes.—Repeal.*—That part of the fee and salary law of Indiana relating to the fees of clerks in naturalization cases (§7324 Burns 1908, Acts 1895 p. 319, §114) is in effect repealed by the Act of Congress of June 29, 1906, 34 U. S. Stat. at Large C. 3592. *State, ex rel. v. Quill*, 495, 498 (4).

2. *Naturalization.—Statutes.—“Fees.”*—The amount of money retained by the clerk of the circuit court under the provisions of the federal naturalization statute (Act of Congress of June 29, 1906, 34 U. S. Stat. at Large C. 3592), is within the meaning of the term “fee,” since the charge for services required of the clerk by said act implies a fee and is specifically designated therein as a fee. *State, ex rel. v. Quill*, 495, 498 (2).

3. *Naturalization.—Ownership of Fees.*—In the naturalization of aliens under the Act of Congress of June 29, 1906, 34 U. S. Stat. at Large C. 3592, the circuit courts of the State act as agencies of the Federal Government, and the officers of such courts are federal officers in that behalf, so that the fees which the clerk of the circuit court is authorized to retain out of the charges provided for services performed under that act belong to him personally and are not controlled by the provisions of the State fee and salary law. *State, ex rel. v. Quill*, 495, 500 (6).

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APPEAL—Continued.**I. APPELLATE JURISDICTION.**

1. *Assignment of Errors.*—The assignment of errors is the appellant's complaint, and jurisdiction is acquired only over the parties whose names appear therein. *Collins v. State*, 488, 489 (3).

II. DECISIONS REVIEWABLE.

2. *Order Vacating Judgment.*—An appeal does not lie from an order vacating a judgment. *Foote v. Foote*, 673, 677 (6).
3. *Record.—Evidence.*—Where the transcript of the evidence is not in the record, there is no question before the court as to the sufficiency of the evidence. *Rooker v. Ludowici Celadon Co.*, 275, 280 (7).
4. *Review.—Judgment.—Failure to Object Below.*—No objection can be presented on appeal to the rendition of a judgment on the verdict, unless by objection in the court below the mistake or defect was pointed out. *May v. George*, 259, 262 (3).
5. *Refusal of Instructions.*—An assignment of error in refusing to give a certain instruction cannot be considered, where such instruction neither appears in the record nor in appellant's brief. *Kirklin v. Clark*, 358, 362 (2).
6. *Sufficiency of Evidence.*—No question can be presented on appeal on the sufficiency of the evidence unless its insufficiency was assigned in the motion as a cause for new trial. *Federal Casualty Co. v. Taylor*, 565, 566 (2).
7. *Presenting Questions for Review.—Conclusions of Law.*—Error in the conclusions of law on a special finding of facts can only be considered when exceptions are duly reserved thereto and the error is presented by independent assignment on appeal. *Rooker v. Ludowici Celadon Co.*, 275, 280 (8).
8. *Questions Presented.—Sufficiency of Complaint.—Findings and Conclusions of Law.*—The exceptions to the conclusions of law present the same questions as the overruling of the demurrer to the complaint, where the facts have been fully and correctly found within the issues. *Judy v. Jester*, 74, 84 (1).
9. *Review.—Misconduct of Counsel.*—Misconduct of counsel in a personal injury case in referring to the presence of the representative of an insurance company is not available for reversal, where the court withdrew the remarks from the jury and instructed it not to consider them. *Horn Tel. Co. v. Weir*, 466, 471 (6).
10. *Party Entitled to Complain.*—An appellant, against whom no judgment was rendered on the complaint and whose appeal is from a judgment rendered on the cross-complaint of a codefendant, cannot complain of alleged error in sustaining a demurrer to his answer to such complaint. *Manufacturers Mut. Fire Ins. Co. v. Swaney*, 429, 434 (6).
11. *Evidence.—Briefs.*—Although not properly presented by appellant's brief, the court is enabled to consider the questions on the motion for a new trial which relate to the sufficiency of the evidence, and the assignment that the verdict is contrary to law, where a sufficient statement of the evidence is contained in appellee's brief. *Western Ins. Co. v. Ashby*, 518, 521 (2).
12. *Questions Presented for Review.—Sufficiency of Complaint.—Exceptions to Conclusions of Law.*—Where the facts specially found by the trial court are substantially the same as those stated in the complaint, an exception to the conclusion of law will present the

APPEAL—Continued.

same question as that raised by a demurrer challenging the sufficiency of the complaint. *Townsend v. Millican*, 11, 13 (1).

13. *Presentation of Questions for Review.—Objections to Evidence.*—Appellant can take no advantage of the erroneous admission of evidence by the trial court where the objection presented on appeal was not presented to the trial court and was entirely different from the only objection presented at the trial.

Wagner v. Meyer, 223, 224 (3).

14. *Order Vacating Judgment.—Record.*—Where, on a motion to vacate the judgment in a divorce proceeding, the judgment was vacated and an order made directing that defendant pay to plaintiff a certain sum for her expenses and attorney fees, and the record fails to disclose that a final judgment was thereafter entered with respect to the issues joined on the pleadings, there was no final judgment from which an appeal could be had. *Foote v. Foote*, 673, 676 (5).

15. *Motion for New Trial.—Record.—Evidence.*—Where no reference is made in appellant's brief to the filing of a bill of exceptions, and no order book entry of the filing of such bill is disclosed by the record, or by the clerk's certificate, it must be held that the evidence is not in the record, and no question is presented on the overruling of a motion for new trial grounded on the alleged insufficiency of the evidence. *Miller v. Armstrong-Landon Co.*, 501, 503 (1).

III. RIGHT OF REVIEW.

16. *Burden of Showing Error.*—Appellant has the burden of pointing out and presenting error in substantial conformity with the rules of court. *Gwynn v. Wabash, etc., Trust Co.*, 391, 397 (7).

17. *Waiver of Error.—Ruling on Demurrer.*—Error in overruling a demurrer to a paragraph of answer is waived by appellant's failure to set out such answer or its substance in his brief.

Jones v. Bryan, 550, 552 (5).

18. *Acceptance of Benefits of Judgment.*—A party cannot prosecute an appeal and thereby reverse a judgment the benefits of which, with full knowledge of the facts, he has voluntarily accepted.

Scott v. Dilley, 100, 103 (1).

19. *Acceptance of Benefits of Judgment.—Guardian and Ward.—Partition.*—Where, in a partition proceeding against a minor defendant, and in which the guardian was not a party, such minor filed a cross-complaint seeking to establish a trust in the property, and judgment was against him on such cross-complaint and decreeing partition as prayed in the complaint, the act of defendant's guardian in taking possession of the land set off to such defendant and deriving the benefit therefrom did not operate to estop the defendant from prosecuting an appeal.

Scott v. Dilley, 100, 104 (2).

IV. PARTIES.

20. *Determination.*—An appeal cannot be determined on its merits, unless the parties to the judgment appealed from are before the court. *Collins v. State*, 488, 489 (2).

21. *Demurrer.—Defect of Parties.*—No question as to defect of parties is presented by the assignment of errors, where the question was not presented to the trial court by the demurrers filed.

Bimel v. Boyd, 310, 313 (2).

APPEAL—Continued.**V. TIME AND NOTICE.**

22. *Vacation Appeal.—Notice of Appeal.—Dismissal.*—Appellant's failure, in a vacation appeal, to give notice of the appeal in compliance with Rule 36 of the court is cause for dismissal.
Alvey v. Wiggs, 263, 264 (1).
23. *Vacation Appeal.—Failure to Give Notice of Appeal.—Waiver.*—Where, prior to the time fixed in appellee's motion to dismiss a vacation appeal for failure to give notice, the appellee entered a full appearance and filed a brief upon the merits, the giving of notice was thereby waived and jurisdiction attached.
Alvey v. Wiggs, 263, 264 (2).

VI. RECORD AND PROCEEDINGS NOT IN RECORD.

24. *Precipe.*—Only such papers and entries as are designated in the precipe are a part of the record on appeal.
Holtz v. Mercantile, etc., Sav. Co., 194, 198 (1).
25. *Questions Presented.*—Where the transcript of the evidence is not in the record, the specification in the motion for new trial, that the decision of the court is contrary to law, presents the same question as that raised by appellant's exceptions to the conclusions of law.
Masson v. Indiana Lighting, etc., Co., 376, 379 (2).
26. *Bill of Exceptions.—Precipe for "Original Copy."*—Where the precipe directed the clerk to insert in the transcript the "original copy of the bill of exceptions," and the clerk's certificate shows that "the original bill of exceptions" is incorporated into the transcript, the bill of exceptions is properly in the record under §657 Burns 1908, Acts 1897 p. 244, since it is apparent that the precipe called for the original bill of exceptions and not for a copy of such original bill.
Holtz v. Mercantile, etc., Sav. Co., 194, 199 (2).
27. *Questions Presented for Review.—Instructions.*—Where the instructions of the appellee and appellant and those given by the court appeared in the order named, following a record entry that "the argument of counsel having been heard, the court having given the instructions, which instructions given and those refused are by order of the court filed in open court and are in the words and figures following," and the instructions of the appellee, as well as those of appellant, were headed by a request properly signed, and at the close contained the memorandum of the court showing those that were given and those refused, followed by the exceptions properly taken and signed, and the court's instructions were properly signed and the exceptions thereto properly taken, the instructions were in the record in substantial compliance with §561 Burns 1908, Acts 1907 p. 652.
Indiana Union Traction Co. v. Sullivan, 239, 244 (3).

VII. ASSIGNMENT OF ERRORS.

28. *General Assignment.—Effect.*—No error is available under a general assignment of error as to the conclusions of law, if any one of the conclusions is correct. *Miller v. Armstrong-Landon Co.*, 501, 503 (2).
29. *Questions Reviewable.*—The assignment of errors constitutes appellant's complaint on appeal, and only such questions will be considered as are thereby presented.
Cleveland, etc., R. Co. v. True, 156, 160 (3).
30. *Form.—Sufficiency.*—An assignment of errors which does not contain the full names of all the parties, or which contains the name

APPEAL—Continued.

of the appellee before the abbreviation "vs." in the title of the cause, instead of that of the appellant, is not in compliance with the rules of court and is insufficient. *Collins v. State*, 488, 489 (1).

31. *Questions Reviewable.—Sufficiency of Complaint.*—No question as to the sufficiency of the complaint is presented on appeal, where the assignment of errors does not show that any error is predicated upon the legal sufficiency of the complaint or upon appellant's exception to the action of the trial court in overruling a demurrer thereto. *Cleveland, etc., R. Co. v. True*, 156, 159 (2).

VIII. BRIEFS.

32. *Defects Cured by Brief of Appellee.*—Appellant's failure to incorporate his motion for a new trial in his brief may be cured by the brief of appellee. *Jones v. Bryan*, 550, 551 (3).
33. *Questions Presented.—Requisites.*—The errors relied on for reversal must be pointed out in appellant's brief in accordance with Rule 22 of the Supreme and Appellate Courts. *St. Joseph, etc., R. Co. v. Raber, etc., Mfg. Co.*, 439 (1).
34. *Sufficiency.*—A brief, though subject to criticism, is sufficient, if it shows a good faith effort to comply with the rules of court and is in substantial conformity with the same as to the questions presented for determination. *Kirk v. Macy*, 17, 19 (1).
35. *Sufficiency.*—A consideration of questions presented is not barred on the ground that appellant's brief does not comply with Rule 22 of the Supreme and Appellate Courts, where the brief evidences a good faith effort to and does substantially comply therewith. *Hanlon v. Conrad-Kammerer Glue Co.*, 504, 506 (1).
36. *Statement of Nature of Action.*—The statement in appellants' brief, that the action was brought by appellee to recover damages for loss of service, etc., of appellee's wife, and is based upon the same alleged negligence upon which the action by appellee's wife against appellants was predicated, is not a statement of the nature of the action in compliance with Rule 22 of the Supreme and Appellate Courts. *City of Evansville v. Pifer*, 452 (1).
37. *Request for Oral Argument.*—A request for oral argument must be seasonably made, before the time for filing briefs has expired and before their consideration by the court; and while it is not improper to incorporate a petition for oral argument in the brief, where it is so incorporated, the cover page of the brief should show that fact in order that it may be brought to the attention of the clerk for filing, since the court will not search the briefs to determine if counsel desire an oral argument. *Hillis v. Dils*, 576, 582 (8).
38. *Questions Reviewable.—Sufficiency.*—On appeal from the sustaining of a motion to vacate a judgment, the statement in appellant's brief of the only two reasons on which the motion was based, although not appearing in the usual place and therefore not in strict accordance with Rule 22 of the Supreme and Appellate Courts, requiring a concise statement of so much of the record as fully presents every error and exception relied on, shows a good faith effort to comply with the rule and is sufficient to advise the court of the questions involved. *Foote v. Foote*, 673, 675 (1).
39. *Waiver of Error.*—Errors assigned are waived by appellant's failure to discuss them in his brief or cite authority to support same. *Masson v. Indiana Lighting, etc., Co.*, 376, 377 (1).

APPEAL—Continued.

40. *Waiver of Error*.—An assignment of errors questioning the sufficiency of answers is waived, where appellant, in his brief, has failed to point out any objections thereto. *Scott v. Dilley*, 100, 104 (3).
41. *Waiver of Error*.—An assignment that the court erred in overruling a motion to strike out certain parts of an answer is waived by appellant's failure to set out the motion in his brief.
Jones v. Bryan, 550, 551 (1).
42. *Waiver of Error*.—An assignment of error that the complaint does not state facts sufficient to constitute a cause of action is waived by appellant's failure to discuss it in the briefs.
Isgrig v. Franklin Nat. Bank, 217, 219 (2).
43. *Waiver of Error*.—An assignment of error in overruling a demurrer to a complaint is waived by appellant's failure to argue such ruling in its brief or to point out any objections to the sufficiency of such complaint.
Lake Erie, etc., R. Co. v. Voliva, 170, 173 (1).
44. *Waiver of Errors*.—Where appellant's brief wholly fails to comply with Rule 22 of the Supreme and Appellate Courts requiring a statement of so much of the record as fully presents every error relied upon, such errors will be deemed waived.
Western Ins. Co. v. Ashby, 518, 520 (1).
45. *Sufficiency—Waiver of Errors*.—Although appellant's failure to properly present in his brief certain errors assigned amounts to a waiver of such errors, such failure will not render the brief insufficient so as to prevent a consideration of questions arising on other errors and which are therein properly presented.
North v. Jones, 203, 206 (1).
46. *Waiver of Error*.—Alleged error in stating the conclusions of law is waived by appellant's failure to set out in the brief either the finding of facts or the substance thereof, but where appellee's brief contains a statement of the facts which, when considered with those shown by appellant's brief, are sufficient to enable the court to know the principal and controlling question in the case, the same may be considered.
Town of Jasper v. Cassidy, 678, 679 (1).

IX. REVIEW.**(A). AS TO EVIDENCE.**

47. *Judgment*.—A judgment will not be disturbed on the evidence if there is some evidence from which the trial court may have found facts sufficient to support the same.
Hillyard v. Robbins, 107, 110 (1).
48. *Judgment*.—A judgment for plaintiff will not be disturbed on the evidence, if there is any evidence tending to support each material averment of the complaint.
Larch v. Holz, 56, 63 (4).
49. *Judgment*.—In an action by the trustee in bankruptcy of an insolvent corporation to recover dividends for the benefit of the creditors, the judgment for defendants was not sustained by evidence and was contrary to law, where it was shown without dispute that at the time the dividends were paid the corporation was insolvent.
Fricke v. Angemeier, 140, 149 (5).
50. *Application to Vacate Judgment by Default*.—That all the evidence upon an application to vacate a judgment by default was by affidavit does not change the rule that the determination of the trial court will not be reviewed where the evidence is conflicting, since such affidavits are not documentary evidence the force and effect of which the court is compelled to construe on appeal.
Peterson v. Dourney, 373, 375 (2).

APPEAL—Continued.

51. *Admission of Evidence.*—Where, in an action for damages caused by the filling of a watercourse and diverting the water into an artificial channel, appellee had testified that the artificial channel was not of sufficient size and capacity to accommodate the water formerly flowing through the creek, and that it was enlarged by washing, that a stone wall had washed out and earth and rock deposited in the creek filling it four or five feet, the court did not err in permitting appellee to answer a question asking him to state, if he knew, what caused the filling at another point in the creek, since the question, taken in connection with the examination immediately preceding, called for a fact and not a conclusion.

Cleveland, etc., R. Co. v. True, 156, 160 (5).

52. *Exclusion of Evidence.*—The court on appeal cannot say that the exclusion of evidence was erroneous, where no specific or vital objections are pointed out in appellant's brief.

Kirklin v. Clark, 358, 366 (10).

53. *Sufficiency.*—Where the evidence is conflicting, and it cannot be said that there was no evidence upon which the court could base its decision, such decision will not be disturbed on appeal on the alleged insufficiency of the evidence. *Wagner v. Meyer*, 223, 224 (1).

54. *Findings.*—If there is any evidence to sustain the finding of the trial court, the judgment will not be reversed on the evidence.

Kirk v. Macy, 17, 23 (9).

55. *Verdict.*—A verdict will not be set aside on appeal for want of evidence on any point on which the evidence is conflicting.

Lawlor v. State, ex rel., 24, 29 (6).

56. *Verdict.*—A verdict will not be disturbed on appeal on the ground of insufficient evidence, if there is any evidence to support it.

Kirklin v. Clark, 358, 364 (6).

57. *Conflicting Evidence.—Verdict.*—The verdict of a jury will not be set aside on appeal for want of evidence to sustain it in a case where the evidence is conflicting or where there is not a total want of evidence to support it.

New Albany, etc., Mills Co. v. Senior, 453, 457 (6).

(B). AS TO INSTRUCTIONS.

58. *Questions Reviewable.*—Unless instructions are brought into the record by one of the modes prescribed by statute, they will not be considered on appeal.

Indiana Union Traction Co. v. Sullivan, 239, 244 (2).

59. *Refusal.*—Where requested instructions on a proposition correctly stated the law, and were not fully and fairly covered by instructions given, their refusal was error. *Lawlor v. State, ex rel.*, 24, 33 (13).

60. *Refusal of Instructions.*—There is no error in refusal of instructions that are fully covered by instructions given.

Jenney Electric Mfg. Co. v. Flannery, 397, 416 (21).

61. *Refusal of Instructions.*—Requested instructions not applicable to the evidence, or which ignore the evidence on a material element of the case, are properly refused.

Kelly-Atkinson Constr. Co. v. Munson, 619, 627 (8).

62. *Refusal of Instructions.*—The rejection of instructions applicable to facts in support of which there was some evidence, and which fairly state the law, constitutes reversible error, unless they were covered by other instructions given, or it appears that the substantial rights of the appellant were not prejudiced by such refusal.

Baltimore, etc., R. Co. v. Peck, 281, 283 (2).

APPEAL—Continued.

63. *Joint Exceptions*.—Alleged error in the giving of instructions will not be considered where the exception thereto was a joint exception and appellant makes no claim of error except as to one of such instructions.

Kelly-Atkinson Constr. Co. v. Munson, 619, 627 (9).

64. *Applicability to Evidence*.—Instructions must be applicable to the evidence, and the giving of one which is not applicable is reversible error, unless it affirmatively appears that no harm resulted therefrom.

Timmons v. Kenrick, 490, 493 (4).

65. In an action by a servant for injury to his eye caused by a particle of emery dust, appellant cannot complain of the court's failure to include a definition of "dust" in the instructions, if he failed to tender the court an instruction containing a proper definition.

Jenney Electric Mfg. Co. v. Flannery, 397, 416 (20).

66. No reversible error is shown in the giving or refusing of instructions, where the instructions given, when considered as a whole, fairly and fully state the law applicable to the issues and evidence, and those refused, in so far as applicable and correct, were covered by those given.

Kinmore v. Cresse, 693, 698 (5).

(C). AS TO PLEADINGS.

67. *Objections to Pleadings—Amendments Deemed Made*.—Objections on account of defects in the pleadings that might have been remedied in the lower court, when raised on appeal, will be deemed to have been so remedied.

Rooker v. Ludowici Celadon Co., 275, 278 (5).

68. *Ruling on Demurrer to Answer*.—It is reversible error to sustain a demurrer to a good paragraph of answer unless its averments may be established by proof admissible under the averments of another paragraph.

Certain v. Smith, 163, 167 (1).

69. *Objection to Complaint—Ruling on Demurrer*.—Alleged error in overruling a demurrer to a complaint, is not available where the objection on which it was based could have been cured in the trial court by a motion to make the complaint more specific.

Kirk v. Macy, 17, 22 (7).

70. *Demurrer to Complaint—Exceptions to Conclusions of Law*.—Where the court makes a special finding of facts and states conclusions of law thereon, the question presented by appellant's exceptions to the conclusions is the same as that raised by the demurrer to the complaint.

Gwynn v. Wabash, etc., Trust Co., 391, 392 (1).

71. *Ruling on Demurrer*.—The ruling of the court in sustaining a demurrer to all the paragraphs of a complaint, when the demurrer filed only questioned the sufficiency of two of the paragraphs, constituted reversible error, although the two paragraphs to which such demurrer was addressed were insufficient.

Citizens Tel. Co. v. Fort Wayne, etc., R. Co., 230, 238 (6).

72. *Questions Reviewable—Sufficiency of Paragraph of Complaint—Recovery on Other Paragraph*.—The sufficiency of a particular paragraph of complaint will not be determined on appeal, where, from answers to interrogatories returned by the jury, and the admissions of the parties, it is shown that the verdict was based on another paragraph, since the error, if any, in overruling the demurrer was harmless.

Lake Erie, etc., R. Co. v. Voliva, 170, 173 (2).

(D). PRESUMPTIONS.

73. On appeal the presumptions are in favor of the trial court.

Gilbert v. First Nat. Bank, 611, 618 (6).

APPEAL—Continued.

74. *Judgment*.—Where no available error is shown, the correctness of the judgment will be presumed.

Western Ins. Co. v. Ashby, 518, 524 (8).

75. *Judgment*.—The court will not search the record for error, and, none being shown by appellant, will presume that the judgment is correct. *St. Joseph, etc., R. Co. v. Raber, etc., Mfg. Co.*, 439, 440 (2).

76. *Judgment*.—On appeal every presumption is indulged in favor of the judgment, and the court will not search the record for errors on which to base a reversal.

Gwynn v. Wabash, etc., Trust Co., 391, 397 (8).

77. *Vacating Judgment*.—It will be presumed on appeal that the trial court was correct in sustaining a motion to vacate a judgment, which showed sufficient cause for setting aside the same, in the absence of a showing that such judgment was vacated at a subsequent term.

Footo v. Footo, 673, 676 (3).

78. *Harmless Error*.—*Burden of Showing*.—Where error is shown in giving an instruction, the presumption arises that it was prejudicial and the burden is on the appellee to show by the record that it was harmless.

Neely v. Louisville, etc., Traction Co., 659, 670 (9).

79. *General Verdict*.—*Answers to Interrogatories*.—All reasonable presumptions will be indulged in favor of the general verdict and against the answers to interrogatories, and if the general verdict thus added is not in irreconcilable conflict with such answers, it must stand.

Southern R. Co. v. Ellis, 34, 39 (4).

80. *Prejudicial Error*.—The presumption is in favor of the judgment of the trial court and appellant has the burden of showing material error, and when such error is shown it will be presumed to have been prejudicial unless the contrary affirmatively appears from the record.

Terre Haute, etc., Traction Co. v. Latham, 366, 371 (6).

(E). VERDICT, ANSWERS TO INTERROGATORIES, FINDINGS AND RULINGS ON MOTIONS.

81. *Conflicting Evidence*.—A verdict will not be disturbed on appeal on conflicting evidence.

Kirklin v. Clark, 358, 365 (8).

82. *Evidence*.—The court on appeal will not disturb the judgment of the lower court on the weight of the evidence.

Gwynn v. Daugherty, 598, 605 (5).

83. *Answers to Interrogatories*.—*Control*.—A general verdict will control as against the jury's answers to interrogatories, if the latter can be reconciled therewith upon any supposable state of facts provable within the issues formed by the pleadings.

Hammond v. Kingan & Co., 252, 254 (2).

84. *Answers to Interrogatories*.—For the purpose of determining the question raised on a motion for judgment on the jury's answers to interrogatories, the averments of the complaint will be assumed as proven.

Wabash R. Co. v. McNown, 116, 132 (14).

85. *Answers to Interrogatories*.—*Presumptions*.—On appeal all reasonable presumptions and intendments will be indulged in favor of the general verdict, and the jury's answers to interrogatories will be strictly construed against the party moving for judgment on them.

Chicago, etc., R. Co. v. Daun, 382, 388 (7).

86. *Answers to Interrogatories*.—On appeal, every presumption will be indulged in favor of the general verdict as against the jury's answers to interrogatories, and such verdict will not be overcome by such answers unless a conflict exists between them and the verdict

APPEAL—Continued.

that is irreconcilable on any theory, or on any supposable state of facts provable under the issues.

Wabash R. Co. v. McNown, 116, 126 (7).

87. *Answers to Interrogatories.—Presumptions.*—In determining the question presented on a motion for judgment on the answers to interrogatories, the court on appeal must assume that there was evidence to support every material averment of the complaint, and unless the answers are irreconcilable with the general verdict on any conceivable state of facts provable under the issues, the general verdict will control.

Henry v. Epstein, 265, 268 (2).

88. *Interrogatories to Jury.—Form.*—Where an interrogatory double in form is propounded without objection and answered, it does not necessarily follow that it must be disregarded on appeal.

Kirklin v. Clark, 358, 364 (5).

89. *Answers to Interrogatories.—Evidence.*—The jury's answers to interrogatories will not be disturbed on appeal, where there was some evidence to sustain them.

Kirklin v. Clark, 358, 362 (3).

90. *Answers to Interrogatories.—Decision in Companion Case.*—Where, under the averments of the complaint in an action for injuries sustained in a collision with an interurban car, the same facts and acts of negligence may have been proved that were proved in another action growing out of the same collision, and which has been decided on appeal, and the jury's answers to interrogatories in the present case are not inconsistent with the facts of the former case, such former case will in a measure be controlling in the one before the court.

Henry v. Epstein, 265, 275 (9).

91. *Ruling on Motion for Judgment on Answers to Interrogatories.*—Whether the trial court erred in overruling a motion for judgment on the answers to interrogatories is to be determined from a consideration of such answers, the general verdict, and the pleadings tendering the issues of fact.

Henry v. Hack, 47, 48 (1).

92. *Motion for Judgment on Answers to Interrogatories.*—In determining the question presented by a motion for judgment on the jury's answers to interrogatories, the court on appeal will consider only the pleadings, the answers to interrogatories and the general verdict.

Henry v. Epstein, 265, 267 (1).

93. *Motion for Judgment on Verdict.—Answers to Interrogatories.*—Questions arising on the action of the trial court in overruling a motion for judgment on the verdict, and in rendering judgment on the answers to interrogatories, involve a consideration of the issues presented by the pleadings, the interrogatories and the general verdict.

Hammond v. Kingan & Co., 252, 254 (1).

94. *Special Findings.—Inferences.*—The court on appeal cannot indulge in inferences to aid special findings of fact.

Marker v. Town of Andrews, 179, 183 (3).

95. *Special Findings.—Sufficiency.—Description of Real Estate.*—The special findings of the court in a proceeding to disannex certain lands from a town, in which a portion of petitioner's land was so erroneously described as to render the same impossible of location, are insufficient to support the conclusions of law and the judgment rendered thereon that a portion of petitioner's land be disannexed and refusing disannexation as to the remainder.

Marker v. Town of Andrews, 179, 181 (1).

96. *Findings.—Conclusiveness.*—The jury's finding that plaintiff's horses were struck by defendant's train is conclusive on appeal if there was evidence to support such an inference by the jury.

Lake Erie, etc., R. Co. v. Voliva, 170, 177 (11).

APPEAL—Continued.

97. *Findings.—Conclusiveness.*—Any evidence that will justify an inference of fact formed by the jury is enough to render unavailing, on appeal, the objection that such finding is not sustained by sufficient evidence. *Lake Erie, etc., R. Co. v. Voliva*, 170, 177 (10).
98. *Findings.—Inferences.*—Where the primary facts found lead to but one conclusion, or where the facts found are of such a character that they necessitate the inference of an ultimate fact, such ultimate fact will be inferred and treated as found. *Judah v. F. H. Cheyne Electric Co.*, 476, 484 (7).
99. *Findings.—Construction.*—Intendments and presumptions are in favor of a finding rather than against it, and if, when read as a whole, such finding can be said to sustain the conclusions of law stated thereon, no error can be successfully predicated on the exceptions to such conclusions. *Judah v. F. H. Cheyne Electric Co.*, 476, 484 (8).
100. *Findings.—Waiver of Lien.*—Special findings showing that no definite time was agreed upon within which defendant was to pay for fixtures furnished by plaintiff and that defendant was given an indefinite time to make payment do not evidence a contract giving defendant the right to fix the time of payment beyond the period within which plaintiff might file a mechanic's lien, and do not show a waiver of plaintiff's right to file and enforce such lien. *Masson v. Indiana Lighting, etc., Co.*, 376, 379 (4), 380 (4).
101. *Findings.—Sufficiency.*—Where the findings in an action to foreclose a mechanic's lien state that the work was completed on July 2, and that plaintiff's notice was filed on September 14, "and within the sixty days from the date on which plaintiff completed the installation and wiring of said electrical apparatus in the said building," it will be presumed, in the absence of the evidence from the record, and in view of the fact that the exhibit filed with the complaint shows items of labor and material furnished up to and including July 22, that the finding that the work was completed July 2, is an error in date, and the finding that the work was completed within the sixty days will control. *Judah v. F. H. Cheyne Electric Co.*, 476, 486 (11).
102. *Ruling on Motion for New Trial.*—Where there was evidence tending to support every material fact found by the court, a motion for a new trial based on the insufficiency of the evidence to support the findings was properly overruled. *Townsend v. Millican*, 11, 16 (6).
103. *Rendition of Judgment.—Motion for New Trial.*—The action of the trial court in rendering judgment on the verdict after a motion for new trial had been filed, and before overruling same, is not ground for reversal, where it appears that appellant did not object thereto on the ground that it desired to move in arrest of judgment, if the motion for a new trial were overruled. *New Albany, etc., Mills Co. v. Senior*, 453, 455 (2), 456 (2).
104. *Ruling on Motion to Make Complaint More Specific.*—Where a complaint to recover on a written agreement for the payment of a certain sum, alleged that the consideration therefor was the payee's agreement to dismiss certain actions which he had pending against defendant and to permit judgment by default in a proceeding to set aside the probate of a certain will, and alleged generally that such payee had performed his part of the agreement, the overruling of a motion to make such complaint more specific by stating the titles of the actions and whether such causes as were agreed upon were in fact dismissed was not erroneous. *Gwynn v. Daugherty*, 598, 603 (1).

APPEAL—Continued.**(F). DISCRETION OF LOWER COURT.**

105. *Review.—Discretion of Court.—Amendment of Pleadings.*—Where the record shows no application by appellant for a continuance after the court permitted the amendment of the complaint to conform to the proof, and the evidence is not in the record, it cannot be said that permitting such amendment was an abuse of the court's discretion. *Hanlon v. Conrad-Kammerer Glue Co.*, 504, 510 (8).

106. *Review.—Questions Presented.—Discretion of Court in Requiring Witness to Testify.*—The question of the proper or improper exercise by the trial court of its power, under the provisions of §526 Burns 1908, Acts 1883 p. 102, to require a witness, otherwise incompetent, to testify, is presented where it appears that, after first holding the witness incompetent to testify as to matters occurring in the lifetime of the decedent, his testimony was received as permissible in the discretion of the court. *Myers v. Manlove*, 327, 331 (4).

(G). HARMLESS ERROR.

107. *Motion to Strike Out.*—Overruling a motion to strike out certain parts of an answer, even if error, is not cause for reversal. *Jones v. Bryan*, 550, 551 (2).

107a. *Objections to Complaint.*—An appellant, against whom no judgment was rendered on the complaint, appealing from a judgment against himself in favor of a codefendant on a cross-complaint, cannot avail himself of objections to the sufficiency of the complaint. *Manufacturers Mut. Fire Ins. Co. v. Swaney*, 429, 432 (1).

108. *Ruling on Demurrer to Answer.*—Sustaining a demurrer to a paragraph of answer, the material allegations of which were provable under other paragraphs, was not erroneous. *Guynn v. Daugherty*, 598, 603 (3).

109. *Ruling on Demurrer to Reply.*—Where a paragraph of reply amounted to no more than an argumentative denial, and the facts pleaded therein were admissible under the general denial, overruling a demurrer thereto was harmless. *Hanlon v. Conrad-Kammerer Glue Co.*, 504, 509 (6).

110. *Instructions.*—An instruction, although containing objectionable expression, will not work a reversal if it is such as not to mislead the jury. *New Albany, etc., Mills Co. v. Senior*, 453, 458 (8).

111. *Instructions.*—Objections to the giving or refusing of instructions, applicable to a paragraph of complaint upon which the verdict was not based, present no available error. *Lake Erie, etc., R. Co. v. Voliva*, 170, 177 (12).

112. *Instructions.*—Where it appears that a verdict was returned on one of two charges of negligence contained in the complaint, the giving of an erroneous instruction applicable only to the other charge, is harmless. *Southern R. Co. v. Ellis*, 34, 40 (6).

113. *Instructions.*—An instruction which told the jury that the defendant had admitted of record that a certain stone marking a section corner was correctly located, by the statement that no evidence would be introduced to dispute its location, was erroneous, but was harmless in view of the fact that at the time the statement was made some evidence had already been introduced tending to show that such stone was correctly located. *North v. Jones*, 203, 215 (12).

114. *Refusal of Instructions.*—In an action against a railroad company for damages from fire, the refusal of instructions that if the fire which destroyed plaintiff's property occurred before the fire which

APPEAL—Continued.

escaped from defendant's right of way, the defendant would not be liable, was harmless, where the jury specially found that the fire on plaintiff's land occurred after the escape of the fire from defendant's right of way. *Baltimore, etc., R. Co. v. Peck*, 281, 284 (4).

115. *Erroneous Instructions.—Applicability to Evidence.*—In an action for injuries received while attempting to board a street car which started on a signal given by a passenger, evidence that the car started very suddenly with a jerk and threw plaintiff to the ground, was susceptible to the inference that in the manner of starting the car defendant's agents did not exercise the degree of care required of them, so that the error in an instruction which ignored the possibility of negligence by defendant's servants was not harmless.

Neely v. Louisville, etc., Traction Co., 659, 671 (12).

116. *Erroneous Instructions.—Answers to Interrogatories.*—Error in the giving of an instruction as to the liability of a street car company to one who was injured while attempting to board its car, which stated that defendant would not be liable, if the starting signal was given by a passenger while the conductor was making his way to the rear platform to see if plaintiff was safely on board, and which ignored the possibility of other negligence by the defendant's servants which may have been a proximate cause of the injury, is not cured by the jury's answers to interrogatories which are silent on the question of the negligence of defendant's servants and which merely found the existence of the particular facts stated in the instruction as sufficient to warrant a verdict for defendant.

Neely v. Louisville, etc., Traction Co., 659, 670 (10).

117. *Erroneous Instructions.—Applicability to the Evidence.*—The court on appeal will not weigh the evidence to determine if error in the giving of an instruction was harmless, but if the undisputed evidence shows that the injury received by one attempting to board a street car was caused solely by the act of a passenger in giving the starting signal, and that there was no negligence by defendant's agents, then a reversal would not be ordered on the ground that the court, in instructing that a verdict for defendant was authorized if the injury was caused by the act of a passenger in giving the starting signal, erred in ignoring the possibility of any negligence by defendant's agents which may have been a proximate cause of such injury.

Neely v. Louisville, etc., Traction Co., 659, 670 (11).

118. *Admission of Evidence.*—The error, if any, on the application of a drunkard for the discharge of his guardian, in permitting questions to be propounded relative to the applicant's moral character, and the character of his place of business, was harmless, where the record discloses that none of the witnesses testified to any immorality, violence or vice on the part of the appellant for a period of a year and a half.

Rose v. Rose, 441, 445 (4).

119. *Admission of Evidence.*—Where, in an action for injuries caused by defective steps in a theatre building the jury specially found that it was dark in the aisle so that one could not see the steps, and that defendant negligently failed to furnish light of sufficient power to disclose the condition of the steps, and that all the lamps provided were not lighted, error, if any, in admitting expert testimony as to whether there was a better way to locate the lights in the building, was harmless.

Valentine Co. v. Sloan, 69, 73 (5).

120. *Misconduct of Counsel.*—Alleged misconduct of counsel was harmless to appellant, where it is apparent that in any event, no different result could have been reached under the issues and the evidence.

Isgrig v. Franklin Nat. Bank, 217, 222 (9).

APPEAL—Continued.

121. *Refusal to Submit Interrogatory to Jury.*—The refusal to submit to the jury a requested interrogatory was harmless, where no answer that might have been made to it could have any controlling effect or influence in determining whether the answers to the interrogatories submitted should prevail against the general verdict.
Lake Erie, etc., R. Co. v. Voliva, 170, 178 (13).

X. DETERMINATION AND DISPOSITION OF CAUSE.**(A). DECISION IN GENERAL.**

122. *Remitting of Verdict.—Right to Complain.*—An appellant cannot complain of the remitting of the verdict against it.
Manufacturers Mut. Fire Ins. Co. v. Swaney, 429, 432 (2).
123. *Law of the Case.*—The prior decision of a cause on appeal becomes the law of the case on a subsequent appeal only in so far as it is applicable to the facts presented on such subsequent appeal.
American Car, etc., Co. v. Inzer, 316, 323 (4).
124. *Exceptions to Conclusions of Law.—Admissions.*—An exception to conclusions of law, for the purposes of the exception, admits that the facts have been fully and correctly found.
Gynn v. Wabash, etc., Trust Co., 391, 394 (2).
125. *Exceptions to Conclusions of Law.—Admissions.*—Appellant's exceptions to the conclusions of law concede, for the purpose of such exceptions, that the facts are fully and correctly found.
Masson v. Indiana Lighting, etc., Co., 376, 379 (3).
126. *Judgment by Default.*—While §405 Burns 1908, §396 R. S. 1881, makes it the imperative duty of the trial court to set aside a judgment by default for the mistake, inadvertence, surprise or excusable neglect of the party against whom it was taken, it is for the court to determine from the evidence whether a sufficient showing has been made, and where the evidence conflicts, the court's action on the application to vacate will not be disturbed on appeal.
Peterson v. Downey, 373, 374 (1).

(B). AFFIRMANCE.

127. *Exceptions to Conclusions of Law.*—The trial court's conclusion that the law is with defendants, correct as to one defendant, but not as to the other, will not be disturbed where separate exceptions were not reserved by plaintiff.
Figgins v. Figgins, 43, 46 (7).
128. *Disposition of Cause.*—Where no error appears in the record, the cause will be affirmed, although a strict compliance with the court rules might warrant a dismissal for imperfections in appellant's brief.
Alvey v. Wiggs, 263, 265 (3).
129. *Erroneous Judgment.—Failure to Ask Modification.—Effect.*—Where a judgment is valid in part, the same will stand on appeal, unless the record shows that proper steps were taken by objection presented to the trial court to secure a modification of the same.
Gynn v. Wabash, etc., Trust Co., 391, 396 (6).

APPLIANCES—

Defective, see MASTER AND SERVANT, 26.

APPLICATION—

For discharge of guardian, see DRUNKARDS 1.

APPOINTMENT—

Of administrator, see EXECUTORS AND ADMINISTRATORS 1-3.

Of successor, see CORPORATIONS 9.

ASSAULT AND BATTERY—

1. *Actions.—Instructions.*—An instruction to return a verdict for plaintiff if the jury found that defendant requested plaintiff to have sexual intercourse with him, and in a rude and insolent manner, and with force, took hold of plaintiff, hugged and kissed her, felt her breasts and attempted to raise her clothing, and during all of that time implored her to yield to his solicitation, all of which was against her will, was not objectionable in failing to tell the jury that the assault and battery must be unlawful, since the facts stated in the instruction, if found to be true, constitute an assault and battery, and an assault and battery is necessarily unlawful.

Timmons v. Kenrick, 490, 491 (1).

2. *Elements of Damage.—Instructions.*—In an action for assault and battery, where there was no evidence that plaintiff had suffered loss of social position or injury to reputation, an instruction on the question of damages in an action for assault and battery which told the jury to assess such damages as the jurors thought plaintiff sustained as the direct result of defendant's conduct without limiting the jury to a consideration of the damages shown by the evidence, and which stated, among other things, that plaintiff may recover for loss of social position and injury to her reputation, was erroneous. (*Wolf v. Trinkel* [1885], 103 Ind. 355, and *Kelley v. Kelley* [1894], 8 Ind. App. 606, distinguished.)

Timmons v. Kenrick, 490, 492 (3), 493 (3).

3. *Evidence.—Presumptions.—Reputation.—Social Position.*—It does not necessarily follow that one injured by an assault and battery has thereby suffered injury to reputation or loss of social position, but such loss, like other elements of damage, must be shown by evidence.

Timmons v. Kenrick, 490, 493 (5).

ASSESSMENT—

Against abutting property, see MUNICIPAL CORPORATIONS 6.

Sheets, admissible in evidence, see EVIDENCE 6.

ASSIGNMENTS—

See SUBROGATION 4.

1. *Evidence.—Admissibility.*—Where two factories were operated nominally as two companies, though by a single management, and the first company assigned its entire property, and under the evidence the conclusion that the assignment included the property of both companies was warranted, the admission in evidence of a subsequent assignment, incomplete on its face, and signed by the individual who managed both companies, and including property of the second company, was not erroneous.

Gilbert v. First Nat. Bank, 611, 618 (7).

2. *Property Included.—Evidence.—Right of Broker to Proceeds of Sale in Payment of Commissions Due from Assignor.*—Where two canning factories were operated nominally as two companies, but by a single management, and to secure an indebtedness for money loaned in the name of the first company for the use of both factories an assignment of all the property of the first company, including all canned corn owned by it, was executed, and in an action subsequently brought by a broker against the assignee to recover commissions due from it, the evidence, though showing that the first company

ASSIGNMENTS—Continued.

did not can corn, showed that the assignment was intended to transfer the property of both companies to defendant, a finding that the assignment included the corn canned by the second company was warranted, so that, as against the set-off of defendant, plaintiff was not entitled to retain the proceeds from the sale of a car of such corn in payment of commissions due to him from defendant's assignor.

Gilbert v. First Nat. Bank, 611, 613 (2).

ASSIGNMENT OF ERRORS—

See **APPEAL** 1, 28-31.

ASSUMPTION OF RISK—

See **MASTER AND SERVANT** 4-7, 21, 40; **THEATRES AND SHOWS** 2.

ATTORNEY—

Employment of, see **RECEIVERS** 1.

AUDITOR—

Duty of, in regard to tax sales, see **TAXATION** 6.

BANKS AND BANKING—

1. *Deposits.—Relation of Bank and Depositor.—Taxation.*—Where a general deposit of cash is made, the bank, as a general rule, becomes the absolute owner of the cash and a debt from the bank in favor of the depositor arises for the amount of such deposit, thus creating the relation of debtor and creditor, but for the purposes of taxation, money deposited in a savings bank or other bank is regarded as the property of the depositor and taxable to him instead of to the bank.
Beard v. Peoples Sav. Bank, 185, 193 (9).

BIDS—

For bridge construction, see **COUNTIES** 2-4.

BILLS AND NOTES—

1. *Action.—Failure to File Verified Denial of Execution.—Effect.*—Failure to file a general denial or special denial under oath amounts to an admission of the execution of the instrument sued on.
Isgrig v. Franklin Nat. Bank, 217, 221 (7).
2. *Action.—Issues.—Directing Verdict.*—Where defendant in an action on a promissory note, filed an unverified answer alleging facts which, if verified, would have constituted a good plea of *non est factum*, and on the trial introduced evidence tending to prove the allegations of such answer, the court did not err in disregarding such evidence and directing a verdict for plaintiff who had made a *prima facie* case, since such answer tendered no issue in relation to the execution of the note, and evidence in its support might properly have been excluded, when offered, as not being within the issues.
Isgrig v. Franklin Nat. Bank, 217, 221 (6).
3. *Action.—Answer Alleging Discharge Different From Method Provided in Note.—Sufficiency.—Notice to Purchaser.*—In an action by the assignee of a promissory note, an answer by the maker alleging an agreement for discharging part of the note by paying an obligation of the payee to another party, and the payment of such obligation by the maker pursuant to such agreement, should also aver that the assignee had notice of the arrangement before he became a purchaser thereof for value.
Certain v. Smith, 163, 167 (4).

BILLS AND NOTES—Continued.

4. *Action.—Answer.—Non Est Factum.*—In an action on a promissory note executed in the name of a partnership, an answer by one of the partners alleging that the note was not executed by him or by any one in his behalf and that it was not executed for any debt owing by him or the partnership, that it was executed, if at all, by the other partner for matters entirely outside the partnership business, that such other partner had no authority to execute it in the name of the partnership, that such execution had not been ratified by defendant or the partnership, and that no part of the consideration or proceeds was ever received by defendant or by the partnership, would, if verified, have constituted a sufficient answer of *non est factum*. *Isgrig v. Franklin Nat. Bank*, 217, 220 (3).
5. *Action.—Defenses Provable Under General Denial.*—In an action on a promissory note brought by the assignee against the maker and the assignor, an agreement between the maker and the payee providing a method for the partial discharge of the obligation in a manner different from that set out in the note, and a partial discharge made in accordance therewith, could not be shown under a general denial. *Certain v. Smith*, 163, 167 (2).
6. *Action.—Defenses Against Bona Fide Purchaser.—Discharge in Manner Not Provided in Note.—Notice to Purchaser.*—The purchaser of a promissory note without notice, but for less than its full value, who is afterwards notified of an agreement between the maker and payee by which the maker, in partial discharge of the note, was to pay, and had paid, an obligation owing by the payee to another party, holds the note as an innocent purchaser only to the extent of the consideration paid at the time of receiving such notice, and, as to the consideration unpaid, subject to the maker's defense of discharge under such agreement. *Certain v. Smith*, 163, 168 (5).
7. *Action.—Defenses.—Discharge in Manner Different From That Provided in Note.*—The payee of a note may agree with the maker for a means or method of discharging the obligation in a manner different from that set out in the note by agreement made either at the time of the execution and delivery of the note, or thereafter while it remains the property of the original payee, and such agreement, when shown to have been duly executed, presents a good defense to an action on the note while it is in the hands of the parties or their assignees with notice. *Certain v. Smith*, 163, 167 (3).
8. *Consideration.—Satisfaction of Debt of Another.*—The note of a partnership given to a bank in payment of the personal note of one of the partners, was not without consideration, since it is not necessary that the consideration should pass from the payee of a note to the maker. *Isgrig v. Franklin Nat. Bank*, 217, 222 (8).
9. *Bills Payable With Exchange.—Negotiability.*—The words "with exchange," or equivalent language, render a bill otherwise negotiable by the law merchant in this State, nonnegotiable in such manner, even though it is made payable at the place where it is drawn and the question of exchange is thereby not involved. *South Whitley Hoop Co. v. Union Nat. Bank*, 446, 447 (1).

BOARD OF COMMISSIONERS—

Is vested with some discretion in passing on bids submitted for the construction of a bridge, see **COUNTIES** 2, 4.

BONA FIDE PURCHASERS—

See **FRAUDULENT CONVEYANCES** 6.

Defenses against, see **BILLS AND NOTES** 6.

BOUNDARIES—

1. *Land Bordering on Lake.—Conveyance by Metes and Bounds.*—If a description is by metes and bounds, and indicates the shore of a lake as one of the boundary lines, the deed conveys no rights to the land covered by the waters of the lake.
Knickerbocker Ice Co. v. Surprise, 286, 297 (9).
2. *Land Bordering on Lake.—Conveyance by Plat.*—Where land bordering on a lake has actually been surveyed, platted and conveyed as a "lot" containing a number of acres of land, the grantee takes the land under the water far enough from shore to make out the full subdivision in which the land is situated.
Knickerbocker Ice Co. v. Surprise, 286, 295 (7), 300 (7).
3. *Monuments.—Government Surveys.*—The original stakes or monuments set by the government surveyors to establish section points control if existing, but if lost the points must be determined from other evidence and the location as thus determined will be controlling.
North v. Jones, 203, 207 (2).
4. *Presumptions.—Straight Lines.—North Section Lines.*—In view of the method employed by the government surveyors in establishing the north line of a section in the tier of sections immediately west of the range line, it may be presumed that such a line is a straight line, but such presumption may be rebutted by the evidence.
North v. Jones, 203, 210 (4).
5. *Section Lines.—Evidence.—Other Surveys.*—Where, in an ejectment proceeding, the location of the eastern terminus of the north line of a certain section of land, which was bounded on the east by the range line, was an essential point in dispute, evidence relating to the survey of the range line was admissible.
North v. Jones, 203, 214 (9).
6. *Evidence.—Instructions.—Province of Jury.*—In an action involving the location of a boundary line, an instruction that fences of long standing erected upon what parties have called the true line, and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared, is erroneous as misleading the jury.
North v. Jones, 203, 215 (11).
7. *Location of Section Corners.—Instructions.*—An instruction which told the jury that if it found that the point at which the north line of section 18 intersected the range line was marked and recorded and undisputed as the original government corner, it might consider its location in determining where the east corner of section 13 was located, was incorrect, since the jury had a right to consider such stone if it found that it did in fact mark the northwest corner of section 18, as located by the government survey, and the instruction inferentially denied such right unless the jury found that such stone was marked and undisputed as the original government corner.
North v. Jones, 203, 216 (14).

BREACH—

Of warranty, see COVENANTS.

BRIDGES—

Contract for, see COUNTIES 2-4.

BRIEFS—

See APPEAL 11 32-46.

BROKERS—

Insurance, see INSURANCE 5.

BURDEN OF PROOF—

See EVIDENCE 3, 8; FRAUDULENT CONVEYANCES 8; NEGLIGENCE 1, 15; TRIAL 2, 10.

"BUSINESS"—

See WORDS AND PHRASES.

CARRIERS—

1. *Carriage of Passengers.—Duty of Carrier.—Opportunity to Board Car.*—It is the duty of a common carrier operating a street car to give to persons, intending to become passengers thereon at its usual stopping places, a reasonable opportunity to board the same.
Neely v. Louisville, etc., Traction Co., 659, 666 (4).
2. *Carriage of Passengers.—Commencement of Relation.—Boarding Street Car.*—By stopping its car, on the signal of a person desiring to take passage thereon, at a point where it is required to receive passengers, a street car company extends an invitation to him to become a passenger and he has a right to enter, and as soon as he steps upon the running board or steps of the car he becomes a passenger, and the company is bound to treat him as such.
Neely v. Louisville, etc., Traction Co., 659, 666 (3).
3. *Injury to Passengers.—Instructions.—Care Required.*—In a passenger's action for personal injuries sustained in alighting from a train, an instruction that it was the duty of those in charge of the train to see and know at the time that no passenger was in the act of alighting before signaling the engineer and putting the train in motion, was erroneous in that it imposes a higher duty than the law exacts and does not distinguish between the duty to be performed and the care required in its performance. *Southern R. Co. v. Ellis*, 34, 39 (5).
4. *Injuries to Passengers.—Instructions.—Ignoring Issues.*—In an action for injuries to a person attempting to board a street car, an instruction that if, while the conductor was going back to the rear platform to see if plaintiff was safely on board, the car was started upon a signal given by a passenger, which the motorman supposed was given by the conductor, the company was not liable, was erroneous in ignoring the possibility of defendant's agents being guilty of negligence in other respects which may have contributed to cause the injury.
Neely v. Louisville, etc., Traction Co., 659, 667 (7), 668 (7).
5. *Injury to Passengers.—Instructions.—Refusal of Instructions.*—In a passenger's action for injuries sustained in alighting from a train, where the court instructed that if the train was in motion when the plaintiff reached the car door, she should have returned to her seat and remained there until the car stopped, that a passenger is as much bound to use care to avoid injury as a carrier is bound to use care to prevent injury, and must act as a person of ordinary prudence would act under the circumstances in order to recover, the refusal of defendant's requested instructions that on the facts detailed, plaintiff, as a matter of law, was guilty of contributory negligence, and that if a reasonably prudent woman, under the circumstances detailed, would not have encountered the risk that plaintiff encountered in attempting to alight, plaintiff was guilty of contributory negligence, was not erroneous.
Southern R. Co. v. Ellis, 34, 41 (9).

CARRIERS—Continued.

6. *Injury to Passengers.—Answers to Interrogatories.—Instructions.—Harmless Error.*—Where, in a passenger's action for injuries sustained in alighting from a train, it appears from the jury's answers to interrogatories that the proximate cause of the injury was the starting of the train before plaintiff had time to alight, and the lurching of the same which forced plaintiff to jump, an erroneous instruction applicable only to the alleged negligence of defendant in not having a servant on the ground or platform when plaintiff attempted to alight, was harmless. *Southern R. Co. v. Ellis*, 34, 40 (8).
7. *Injury to Passengers.—Verdict.—Answers to Interrogatories.*—In a passenger's action against a railroad company for injuries sustained while alighting from a train, answers to interrogatories that the train did not stop a reasonable time for plaintiff to alight, that it was moving when she reached the coach platform, that its speed was three miles an hour and was increasing as she descended the steps, that there was an unusual jerk of the train while she was on the coach steps, that she went down the steps for the purpose of alighting and at the time was confused and excited, that she did not step off the train, but was forced to jump by a lurch of the coach, and that she was not thrown from the coach by a sudden or violent movement of the train, are not in irreconcilable conflict with a verdict for plaintiff. *Southern R. Co. v. Ellis*, 34, 38 (1), 39 (1).
8. *Injury to Passengers.—Duty to Passenger Alighting From Train.*—A railroad company owes to its passenger the duty of stopping the train a reasonable time to enable the passenger to alight before again putting the train in motion, and the failure to perform such duty is negligence and renders the company liable for injuries proximately resulting. *Southern R. Co. v. Ellis*, 34, 40 (7).
9. *Injuries to Passengers.—Proximate Cause.—Contributory Negligence of Third Persons.*—Although a carrier is not liable for an injury to a passenger caused solely and proximately by the unauthorized, unforeseen and independent act of another passenger, if the servants of the carrier were also guilty of negligence which was a proximate cause, or was directly connected with the proximate cause of such injury, the fact that an act of a passenger also contributed thereto will not in and of itself relieve the carrier from liability. *Neely v. Louisville, etc., Traction Co.*, 659, 664 (1).
10. *Injuries to Passengers.—Degree of Care Required.—Receiving and Discharging Passengers.*—While a common carrier of passengers is not an insurer of their safety, it must exercise the highest degree of care consistent with the mode of its conveyance and the practical prosecution of its business for the safety and protection of its passengers, and the conductor in charge of a train or car is bound to know, if by the exercise of due care he could know, whether any person is attempting to get on or off his train or car before permitting the same to start in such manner as to injure the person so getting on or off. *Neely v. Louisville, etc., Traction Co.*, 659, 665 (2).

CASE—

Decision in companion, see APPEAL 90.

CASES—**DISTINGUISHED:**

- Hill v. Braden* (1876), 54 Ind. 72, see *Judah v. F. H. Cheyne Electric Co.*, 476, 486 (12).
Hill v. Ryan (1876), 54 Ind. 118, see *Judah v. F. H. Cheyne Electric Co.*, 476, 486 (12).

CASES—Continued.

Kelley v. Kelley (1894), 8 Ind. App. 606, see *Timmons v. Kenrick*, 490, 492 (3), 493 (3).
Kinney v. Heuring (1909), 44 Ind. App. 590, see *Shuey v. Lambert*, 567, 573 (7).
McGrew v. McCarty (1881), 78 Ind. 496, see *Judah v. F. H. Cheyne Electric Co.*, 476, 486 (12).
Hilkerson v. Rush (1877), 57 Ind. 172, see *Judah v. F. H. Cheyne Electric Co.*, 476, 486 (12).
Wolf v. Trinkel (1885), 103 Ind. 355, see *Timmons v. Kenrick*, 490, 492 (3), 493 (3).

CAPITAL—

Stock, see CORPORATIONS 1, 4.

CATTLE GUARDS—

Failure to maintain, see RAILROADS 35-38.

CEMETERIES—

Cemetery Associations.—Liability for Negligence.—“Business.”—“Charitable Association.”—There is nothing in the act of June 17, 1852, 1 R. S. 1852 p. 458, providing for the organization of cemetery associations, that prohibits an association organized thereunder from conducting a business for profit, or from paying salaries to its officers, or dividends to its stockholders, so that, in an action against such an association for injuries resulting from its alleged negligence, an answer from which it appears that defendant was in the business of selling burial lots and maintaining a cemetery, although not for profit, is insufficient on the theory that defendant is a charitable and benevolent association, and therefore not liable for the negligence of its officers and agents, since the officers were not administering a charitable trust, but were conducting a business.
East Hill Cemetery Co. v. Thompson, 417, 421 (2).

CHANGE OF VENUE—

See VENUE.

“CHARITABLE ASSOCIATION”—

See WORDS AND PHRASES.

CHOICE OF METHODS—

Of work, see MASTER AND SERVANT 18-20, 22.

CIRCUIT COURTS—

See COURTS.

CITIZENS—

Rights of, of other states, see CONSTITUTIONAL LAW 4.

CLAIMS—

Inconsistent, see ESTOPPEL 2.

Against a county, see COUNTIES 1.

For credits, see EXECUTORS AND ADMINISTRATORS 8.

CLERKS OF COURTS—

Compensation and Fees.—Statutes.—Under §7324 Burns 1908, Acts 1895 p. 319, §114, the clerk of the circuit court is not required to account to the county for all the emoluments of his office, but only for such fees as are provided for in the statutory fee bills.

State, ex rel. v. Quill, 495, 499 (5).

COMPENSATION—

See SUBROGATION 4.

COMPLAINT—

See PLEADING 4-17.

CONCLUSION—

Of law, see APPEAL 7, 8, 12.

CONCLUSIONS OF LAW—

See DEEDS 6.

Exceptions to, see APPEAL 70.

CONCLUSIVENESS—

Of notary's jurat, see COUNTIES 3.

CONGRESS—

A state law which is in conflict with an act of, is invalid, see STATUTES 1.

Has exclusive jurisdiction over the subject of the naturalization of aliens, see CONSTITUTIONAL LAW 3.

CONSIDERATION—

See BILLS AND NOTES 8.

Expressed in a deed is always subject to explanation and when not correctly expressed, the true consideration may be alleged and proved, see DEEDS 1.

CONSTITUTIONAL LAW—

See TAXATION 3.

1. *Due Process of Law.—Deprivation of Property.*—One may not be deprived of his property without due process of law.

Brown-Kelcham Iron Works v. George B. Swift Co., 630, 638 (4).

2. *Due Process of Law.—Deprivation of Property.—Foreign Corporations.—Process.*—When the question is properly raised in an action against a foreign corporation the court must determine whether the prescribed mode of service does in fact deprive such corporation of its property without due process of law, and its determination is generally final in so far as property within the jurisdiction of the State is affected; but where the judgment affects property in another state, or is questioned in a court of such state, such court may determine for itself whether the prescribed mode of service is consistent with due process of law.

Brown-Kelcham Iron Works v. George B. Swift Co., 630, 645 (11).

3. *Naturalization of Aliens.—Power of Congress.*—Under §8, Art. 1, of the Federal Constitution, the Congress has exclusive jurisdiction over the subject of the naturalization of aliens.

State, ex rel. v. Quill, 495, 497 (1).

CONSTITUTIONAL LAW—Continued.

4. *Pursuit of Business.—Rights of Citizens of Other States.*—The legislature has no power to prevent a citizen of another state from coming into this State, or to prohibit him from doing business therein since such right is given both by the organic law of the State and of the United States without the permission or comity of the state.
Brown-Kelcham Iron Works v. George B. Swift Co., 630, 644 (8).

CONSTRUCTION—

See DEEDS 2, 3; INSURANCE 7; PLEADING 1, 2.

Of complaint, see PLEADING 16.

Of findings, see APPEAL 99.

Of statutes, see STATUTES 2-5.

Of wills, see WILLS 2-5.

Of law that exempts from sale on execution, see EXEMPTIONS 3.

In the, of a judgment reference may be had to the pleadings and to the entire record, see JUDGMENT 1.

If an interrogatory is doubtful in its meaning the doubt will be resolved in favor of the general verdict, see TRIAL 12.

CONTRACTORS—

Bond of, see MUNICIPAL CORPORATIONS 1-3.

CONTRACTS—

See COUNTIES 2-4; SUBROGATION 4; WORK AND LABOR.

The board of county commissioners is vested with some discretion in passing on bids submitted for the construction of a bridge, see COUNTIES 2.

1. *Action.—Variance.*—Where plaintiff alleges an oral contract, he is bound thereby, and will not be permitted to recover on proof showing that it was in fact in writing.
Wabash R. Co. v. Grate, 583, 595 (4).
2. *Complaint.—Presumptions.*—Where it is not alleged in the complaint that the contract relied on was in writing, it will be presumed to be verbal.
Wabash R. Co. v. Grate, 583, 591 (3).
3. *Action.—Complaint.—Sufficiency.*—A complaint by the assignee of a written agreement for the payment of certain money to be derived from the sale of certain property, to recover on an amount alleged to be due thereon, setting forth the agreement and the assignment thereof, alleging the consideration for its execution to be the dismissal of certain pending actions and payee's agreement to permit judgment by default in a certain proceeding, and alleging generally the payee's performance of his part of the agreement, that defendant had sold the property and that a certain amount was still due from defendant out of the proceeds thereof, was sufficient to withstand a demurrer.
Gynn v. Daugherty, 598, 603 (2).

CONTRIBUTORY NEGLIGENCE—

See MASTER AND SERVANT 16-18, 20-23; NEGLIGENCE 10-17; RAILROADS 8, 11, 12, 34, 37, 41.

Of third person, see CARRIERS 9.

CONVEYANCES—

See HUSBAND AND WIFE 5; PARTITION.

By metes and bounds, see BOUNDARIES 1.

Obtained by fraud, see FRAUD 1.

CONVERSION—

1. *Action Against Cotenant.—Demand.*—In an action by one cotenant against another for the conversion of common property, no demand is necessary. *Bimel v. Boyd*, 310, 315 (6).
2. *Cotenants.*—A conversion of common property may be accomplished by a cotenant in possession, by rendering impossible any further enjoyment of it by his cotenant, by refusing to appropriate it to the uses for which it is designed, by appropriating it to uses for which it was not designed, or by excluding the cotenants from its use. *Bimel v. Boyd*, 310, 314 (5).
3. *Complaint.—Sufficiency.*—A complaint alleging generally that defendants converted the property to their own use was not insufficient on demurrer, although it might properly have been subject to a motion to make more specific as to the particulars of the alleged conversion. *Bimel v. Boyd*, 310, 316 (7).
4. *Complaint.—Necessary Allegations.—Demand.*—Where an actual conversion is alleged, it is not necessary to aver a demand but it is essential that the complaint should contain averments showing that the plaintiff owns such an interest in the property as to give him the right to sue for its conversion, the value of the property, and its conversion by the defendant. *Bimel v. Boyd*, 310, 313 (3).
5. *Complaint.—Sufficiency.—Cotenants.*—A complaint charging that defendants converted certain bonds to their own use, and alleging facts showing that defendants are cotenants in the bonds with plaintiffs, is not insufficient on the ground that it states specific facts inconsistent with the allegation of conversion, since one may convert common property as against a cotenant. *Bimel v. Boyd*, 310, 314 (4), 315 (4).

CORPORATIONS—

1. *Dividends.—Payment Out of Capital Stock.—Recovery for Payment of Debts.*—The right to recover dividends paid out of a corporation's capital stock, for the payment of its debts, clearly exists. *Fricke v. Angemeier*, 140, 149 (4).
2. *Dividends.*—A dividend cannot be rightly declared by a corporation until there is a showing that a profit has been really earned for the year such dividend was declared. *Fricke v. Angemeier*, 140, 146 (3).
3. *Dividends.—Debts Due Stockholders.*—A dividend is not a debt due a stockholder until it has been rightly declared. *Fricke v. Angemeier*, 140, 146 (2).
4. *Capital Stock.—Corporate Debts.—Preferences.—Stockholders.—Officers.*—The capital stock of a corporation is not a trust fund to be held intact for the benefit of creditors, and an insolvent corporation in the payment of its debts, may prefer directors and stockholders over other creditors. *Fricke v. Angemeier*, 140, 144 (1).
5. *Foreign Corporations.—Right to Exclude or Restrict.*—The State, by legislative enactment, may grant or refuse a foreign corporation the right to do business within its borders, and may provide the terms and conditions on which such corporations may come into the State for such purpose. *Brown-Ketcham Iron Works v. George B. Swift Co.*, 630, 644 (9).

CORPORATIONS—Continued.

6. *Foreign Corporations.—Regulation.—Service of Process.—Statutes.—Validity.*—The act approved March 15, 1901, Acts 1901 p. 621, prescribing the conditions on which foreign corporations could be admitted to transact business in the State, and providing a method for service of process in actions against foreign corporations, was a proper exercise of legislative power.
Brown-Ketcham Iron Works v. George B. Swift Co., 630, 646 (13).
7. *Foreign Corporations.—Regulations.—Statutes.*—The purpose of the act approved March 15, 1901, Acts 1901 p. 621, providing conditions for the admission of foreign corporations to do business in the State, was not only to give to such corporations the right to do business within the State, but also to provide a method of making them yield to the jurisdiction of the courts of the State when necessary to determine the rights of citizens of the State by reason of business transacted by such corporations within the State.
Brown-Ketcham Iron Works v. George B. Swift Co., 630, 649 (17).
8. *Foreign Corporations.—Regulation.—Right to Change Conditions.—Withdrawal From State.—Revocation of Agent's Authority.*—While succeeding legislatures may revoke, modify or change the conditions upon which a foreign corporation is permitted to do business within the State, such an act could apply only to the future business of such corporation, so that any right that such corporation may have, based on the theory of mutuality of right and privilege, to withdraw from the State and revoke the authority of its agent in the State, could affect only its future business and could not affect or take away any rights growing out of business already done by such corporation under its license.
Brown-Ketcham Iron Works v. George B. Swift Co., 630, 646 (14).
9. *Foreign Corporations.—Termination of Agency.—Appointment of Successor.*—Upon the death or resignation of an agent of a foreign corporation appointed as a condition precedent to doing business in the State, or upon the termination of such agency from any cause, it is the duty of such corporation to appoint a successor so long as liabilities resulting from business already done under its license remain outstanding.
Brown-Ketcham Iron Works v. George B. Swift Co., 630, 648 (15).
10. *Foreign Corporations.—Action.—Process.*—The State may not only provide the manner and mode of service of obtaining jurisdiction over foreign corporations doing business therein, but may also require such corporations to accept the terms of the mode of service so provided as a condition precedent to doing any business in the State.
Brown-Ketcham Iron Works v. George B. Swift Co., 630, 645 (10).
11. *Foreign Corporations.—Action.—Service of Process.—Sufficiency of Service.—Jurisdiction.*—The question of whether service of process in an action against a foreign corporation was had on an authorized agent is in no way affected by the existence or nonexistence of money, credits or effects within the State belonging to defendant or due to it, but a showing as to whether the same existed would be essential in determining whether the court might, by a supplemental pleading in attachment or garnishment, acquire such jurisdiction of the person as would enable it to proceed to final judgment *in rem*.
Brown-Ketcham Iron Works v. George B. Swift Co., 630, 638 (3).
12. *Foreign Corporations.—Action.—Service of Process.—Plea in Abatement.—Theory.—Requisite.*—In an action against a foreign corporation, a plea in abatement grounded on the theory that, on account of defendant's withdrawal from the State and the revocation of the authority of its agent to accept service of process, the court

CORPORATIONS—Continued.

had been deprived of any jurisdiction of the defendant, would be insufficient without a showing that the cause of action did not arise within the State; but such denial is not essential in a plea where the theory is that the court has not obtained jurisdiction of the person of defendant by the service of process upon its alleged agent and that such service should be set aside and the summons quashed.

Brown-Ketcham Iron Works v. George B. Swift Co., 630, 638 (2), 640 (2).

13. *Foreign Corporations.—Effect of Accepting License.—Process.—Service on Agent.*—A foreign corporation by accepting a license to do business in the State pursuant to the act approved March 15, 1901, Acts 1901 p. 621, and by complying with the conditions thereof and naming an agent upon whom service of process may be had, and by coming into and doing business within the State under such license, in effect agrees that service of process under such act shall be a valid service against it, when sued by a citizen of the State on a contract made in the State during the time it was so doing business, and in such an action it may not defeat the jurisdiction obtained by such service by showing a revocation of its agent's authority to receive such service, unless it also shows that thereafter another agent was appointed on whom process may be had.

Brown-Ketcham Iron Works v. George B. Swift Co., 630, 649 (16).

14. *Foreign Corporations.—Service of Process.—Validity of Prescribed Method.—Recognition by Federal Courts.*—The mode of service prescribed by the laws of a state for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, obtains similar recognition in the federal courts, in so far as the same affects property of foreign corporations within such state.

Brown-Ketcham Iron Works v. George B. Swift Co., 630, 646 (12).

15. *Foreign Corporations.—Action.—Service of Process.—Plea in Abatement.—Sufficiency.*—In an action against a foreign corporation, a plea in abatement, alleging its withdrawal from the State and the revocation of the authority of its agent, was insufficient to show that the court had not obtained jurisdiction of the person of defendant by service on such agent, in the absence of allegations showing the appointment of another agent on whom service could be had.

Brown-Ketcham Iron Works v. George B. Swift Co., 630, 652 (19).

COTENANTS—

See **CONVERSION**.

COUNTIES—

1. *Claims Against County.—Validity.—Duty of Claimant.*—One who presents a claim against a county must point out a statute authorizing its payment and show that he has fully complied with its provisions.
Vollmer v. Board, etc., 149, 156 (7).
2. *Bridges.—Contracts.—Bids.—Discretion of Board of Commissioners.*—Under the provisions of §5896 Burns 1908, Acts 1907 p. 580, that contracts shall be let to the lowest responsible bidder, and that the board of commissioners shall have power to reject any and all bids, or under §7689 Burns 1908, Acts 1905 p. 521, providing that the board may let the contract to the lowest and best bidder, and that it may reject any and all bids, the board of county commissioners is vested with some discretion in passing on bids submitted for the construction of a bridge.
Eigenmann v. Board, etc., 1, 3 (1).
3. *Contracts.—Bids.—Affidavit of Bidder.—Signatures.—Conclusiveness of Notary's Jurat.*—A bidder's noncollusion affidavit, containing

COUNTIES—Continued.

the matters prescribed by statute (§5897 Burns 1908, Acts 1907 p. 580), and signed "Grammer & Smith" and bearing the jurat of a notary showing that it was subscribed and sworn to, is sufficient in the absence of evidence that it was not individually signed by the two men, since the use of one's Christian name is not material to the validity and binding effect of his signature.

Eigenmann v. Board, etc., 1, 5 (3).

4. *Bridges.—Contracts.—Bids.—Discretion of Board of Commissioners.*

—*Evidence.*—In a taxpayer's action to enjoin the carrying out of certain contracts for the construction of bridges, the decision of the trial court, that the rejection of a certain bid by the board of commissioners was not arbitrary and was not an abuse of the discretion vested in such board, was warranted by evidence showing that the experience of the board with the successful bidders with reference to the performance of other contracts, had been entirely satisfactory, that the accepted bid on one bridge was \$28 higher than the rejected bid, and \$30 higher as to the other bridge, that the past personal experience of the board with the representative of the lower bidder in the construction of bridges had been unsatisfactory, that such representative was a director and vice-president of the company that submitted the low bid, and that in awarding the contracts the board considered such facts and also the character of the work to be performed and the ability of the bidders to perform same.

Eigenmann v. Board, etc., 1, 4 (2).

COURTS—

1. *Rules.—Validity.*—Courts have the inherent power to make rules for the proper conduct of their business, and which do not conflict with the statutes, and such rules, when made, are obligatory both upon court and litigants.

Knickerbocker Ice Co. v. Surprise, 286, 292 (3).

2. *Circuit Courts.—Exercise of Probate Jurisdiction.—Equitable Questions.*—The circuit courts, in the exercise of their probate jurisdiction, have the power to determine either legal or equitable questions, when properly presented, and to award all the necessary relief.

Chamness v. Chamness, 225, 228 (2).

COVENANTS—

1. *Warranty.—Breach.—Damages.*—While upon a total breach of covenant a purchaser may generally recover the whole consideration money, where the breach is only partial he may recover *pro tanto* only, and where there is a failure of title to one of several tracts, conveyed by the same deed, the vendee can recover the consideration paid for such particular tract.

Hanlon v. Conrad-Kammerer Glue Co., 504, 506 (2), 509 (2).

2. *Breach of Warranty.—Complaint.—Sufficiency.*—Where a deed contained two separate independent clauses of conveyance, the first of which warranted title and mentioned a consideration, and the second of which conveyed and quitclaimed with no consideration expressed therein, a complaint for a breach of the warranty, alleging that defendants, in consideration of the sum of money mentioned in the first clause, sold and conveyed the land described in such first clause, the title to which was defective, is sufficient as against a demurrer, to overcome any possible presumption that the consideration expressed was intended as a consideration for all the land conveyed, and to present the question as one of fact for the jury.

Hanlon v. Conrad-Kammerer Glue Co., 504, 507 (3), 508 (3).

CREDIBILITY—

Of witnesses, see WITNESSES 1, 2.

CREDITORS—

Rights of, see EXECUTORS AND ADMINISTRATORS 1; SALES 2.

CROSS-EXAMINATION—

See WITNESSES.

CROSSINGS—

Accidents on, see RAILROADS 1-20.

Gongs at, see RAILROADS 25.

Signals at, see RAILROADS 23.

Failure to signal approach of train to, see RAILROADS 22.

DAMAGES—

See COVENANTS 1; ELECTRICITY 2; NEGLIGENCE 14.

Action for, see INTOXICATING LIQUORS 6-9; TRIAL 15.

1. *Trial.—Interrogatories to Jury.—Itemizing Damages.*—As a general rule it is improper in tort actions to require the jury to answer interrogatories itemizing the elements of damage, where it is unnecessary to plead such elements of damage.

Cleveland, etc., R. Co. v. True, 156, 162 (8).

DEBTS—

See DESCENT AND DISTRIBUTION 1-3.

DECLARATIONS—

Of an agent, see EVIDENCE 10.

DEEDS—

Tax, see TAXATION 6.

1. *Consideration.—Evidence.*—The consideration expressed in a deed is always subject to explanation, and when not correctly expressed, the true consideration may be alleged and proved.

Hanlon v. Conrad-Kammerer Glue Co., 504, 508 (4).

2. *Construction.—Intention of Parties.*—In construing a deed, the words employed should be given their fair, usual and reasonable meaning, and the intention of the parties, if discernible and not unlawful, should be effectuated.

Figgins v. Figgins, 43, 45 (1).

3. *Construction.—Interest Conveyed.*—A deed reciting that the grantors convey and warrant to the grantee for life, and that, at the death of the grantee, the real estate conveyed is to revert to the right, title and interest of grantee's son, without process of law, conveyed a life estate to the grantee and the fee simple to her son.

Figgins v. Figgins, 43, 45 (2).

4. *Delivery.—Intent of Grantor.*—To constitute a delivery of a deed so as to pass title it is necessary that the grantor should intend to give effect to the instrument.

Townsend v. Millican, 11, 15 (2).

5. *Delivery.—Intent of Grantor.—Question of Fact.*—The intention of a grantor, with reference to the delivery of a deed so as to pass title, may be manifested by words, acts, or conduct, and is generally a question of fact for the court or jury trying the issues of fact.

Townsend v. Millican, 11, 15 (3).

DEEDS—Continued.

6. *Delivery.—Evidence.—Findings.—Conclusions of Law.*—The finding of the trial court that plaintiff did not intend to pass title by a deed which he signed and caused to be recorded, is not overcome by evidentiary facts set out in the finding that may be reconciled with the ultimate fact so found, so that its conclusion of law that plaintiff's title should be quieted was not erroneous.

Townsend v. Millican, 11, 16 (5.)

7. *Delivery.—Prima Facie Delivery.—Evidence.*—While evidence that a deed was placed on record by a grantor after it had been duly signed, acknowledged and transferred for taxation, shows a *prima facie* case of delivery, such *prima facie* case may be rebutted by evidence of words, acts, or conduct, tending to show that it was not the intention of the grantor to give effect to the instrument.

Townsend v. Millican, 11, 15 (4).

8. *Execution of Deed to Correct Prior Deed.—Effect.*—A deed of correction relates back to the time of the original conveyance and takes the place of it, and the consideration of the first deed is the consideration for the subsequent deed.

Hanlon v. Conrad-Kammerer Glue Co., 504, 509 (5).

DEFAULT—

See JUDGMENT 4, 5.

DELIVERY—

See GIFTS; SALES 1.

Of deed to pass title, see DEEDS 4-7.

DEMAND—

See CONVERSION 1, 4.

DEMURRER—

See PLEADINGS 23-25.

DEPOSITS—

Of money in a savings bank or other bank are regarded as the property of the depositor and taxable to him instead of to the bank, see BANKS AND BANKING.

DESCENT AND DISTRIBUTION—

1. *Husband and Wife.—Debts.*—Under §3016 Burns 1908, Acts 1891 p. 71, a surviving husband acquires one-third of his deceased wife's real estate free from her postnuptial debts.

Hillis v. Dils, 576, 579 (1).

2. *Husband and Wife.—Debts.—Estoppel.*—Under the provisions of §3016 Burns 1908, Acts 1891 p. 71, the surviving husband of a deceased wife is entitled to one-third of her real estate, subject only to its proportion of her antenuptial debts, unless he has in some way waived his right thereto, or estopped himself to assert such right. (*Kinney v. Heuring* [1909], 44 Ind. App. 590, distinguished.)

Shuey v. Lambert, 567, 573 (7).

3. *Husband and Wife.—Debts.—Mortgages.—Expenses of Last Illness and Funeral.*—Conclusions of law that the husband's one-third in the proceeds of the sale of his deceased wife's real estate was subject to the payment of a proportionate part of a certain mortgage and of the expenses of the illness and funeral of the wife, as well as cer-

DESCENT AND DISTRIBUTION—Continued.

tain expenses of administration, were erroneous where it was not shown that the mortgage was for the wife's antenuptial debt, nor that the husband had joined in its execution or even that it covered her real estate, and it was shown that the other expenditures were incurred without his knowledge and that credit therefor was not extended to him, but to the estate. *Shuey v. Lambert*, 567, 574 (8).

4. *Rights of Surviving Wife.—Estates Under Five Hundred Dollars.*—Under §§2943–2946 Burns 1908, §§2419 and 2422 R. S. 1881, Acts 1903 p. 145, providing for the vesting in the widow of the estate of her deceased husband, where the same is worth less than \$500, the rights of a widow, who has complied with all the conditions imposed by the statute and has procured a decree vesting title in her, are not affected by an outstanding judgment for tort against the decedent, on which an execution had been issued and served in the lifetime of decedent, since the statute specifically provides that a widow in acquiring property thereunder shall not be liable for any of decedent's debts, except mortgages of real estate and the expenses of his last sickness and funeral. *Turner v. Hammerle*, 437, 438 (1).

DESCRIPTION—

A defective, in a notice of mechanic's lien may be so amended as to make it good if the notice contains any reference, which, aided by extrinsic evidence, may correct the description, see **MECHANIC'S LIENS** 2.

DETERMINABLE FEE—

The owner of a, in real estate has all the right of an owner in fee simple in regard to the use or disposal of the real estate, see **WILLS** 6.

“DILIGENT”—

See **WORDS AND PHRASES**.

“DILIGENT USE OF FACULTIES”—

See **WORDS AND PHRASES**.

DIRECTING VERDICT—

See **BILLS AND NOTES** 2; **NEGLIGENCE** 29; **TRIAL** 4, 5.

DISCHARGE—

Of guardian, see **DRUNKARDS** 2, 3.

Of surety, see **MUNICIPAL CORPORATIONS** 1, 2.

DISCRETION OF COURT—

See **APPEAL** 105, 106; **DIVORCE** 1, 2; **DRUNKARDS** 1, 3; **PLEADING** 26; **RECEIVERS** 2; **WITNESSES** 4, 9.

DIVERSION—

Of watercourse, see **RAILROADS** 21.

DIVIDENDS—

Paid out of a corporation's capital stock may be recovered, see **CORPORATIONS** 1.

Cannot be rightly declared until there is a showing that a profit has been really earned, see **CORPORATIONS** 2.

DIVORCE—

1. *Alimony—Review.*—The amount of alimony allowed in each case rests largely in the discretion of the trial court, and, unless it appears that the court abused its discretion in awarding alimony, the judgment will not be reversed on appeal.
Huffman v. Huffman, 201, 202 (3).
2. *Alimony.—Discretion of Court.*—The amount of alimony to be awarded in each particular case is largely within the discretion of the trial court, and, unless an abuse of this discretion is shown, a cause will not be reversed on appeal on the ground that the alimony allowed is excessive.
Shafer v. Shafer, 325, 326 (1).
3. *Alimony.—Amount.—Matters to be Considered.*—For the purpose of determining the amount of alimony to be given in any case, the court may inquire into the circumstances of the parties, ascertain the amount of property owned by the husband, the source from which it came, the ability of the husband to pay, by reason of his financial condition, as well as his income and ability to earn money.
Huffman v. Huffman, 201, 202 (2).
4. *Alimony.—Amount.—Matters to be Considered.*—Where a husband and wife were tenants by entireties of real estate purchased and paid for by the husband, it was proper for the court, in granting a divorce and fixing the alimony, to consider such fact and that the wife upon the granting of the divorce became the owner of an undivided one-half of such real estate.
Huffman v. Huffman, 201, 202 (1).

DRAINS—

1. *Prescriptive Right.—Evidence.*—In an action for the abatement of a nuisance consisting of the pouring of soapsuds and other offensive matter into a gutter, defendant's claim to a prescriptive right to use the gutter, even if obtainable under some circumstances, cannot be sustained, where there was no evidence that such drain had been used for that purpose prior to six years before the bringing of the action.
May v. George, 259, 263 (6).

DUE PROCESS OF LAW—

See CONSTITUTIONAL LAW 1, 2.

"DUST"—

See WORDS AND PHRASES.

DRUNKARDS—

1. *Application for Discharge of Guardian.—Evidence.—Discretion of Court.*—Although the evidence on the application of a drunkard to have his property restored and the guardian discharged, showed that he had refrained from drinking for a period of about a year and a half prior to the trial of the cause, the court did not abuse its discretion in denying the application, where the interrogation of the applicant by the court developed facts tending to show that he had once before refrained from drinking for about a year and then commenced again.
Rose v. Rose, 441, 444 (3).
2. *Discharge of Guardian.—Reformation.*—The reformation contemplated by §6177 Burns 1908, §4320 R. S. 1881, providing for the discharge of the guardian of an habitual drunkard on a proper showing that the inebriate has reformed, is none other than that of a good faith reformation of the inebriate in his use of intoxicating liquors, and is shown by satisfactory evidence that he has in fact been led to see and realize the importance of controlling his appetite for liquor,

DRUNKARDS—Continued.

and that by his total abstinence for the period relied on he has evidenced both a good faith desire and ability to continue to refrain from the use of such liquors. *Rose v. Rose*, 441, 444 (2).

3. *Guardians.—Discharge of Guardian.—Discretion of Court.—Statutes.*—Under §6177 Burns 1908, §4320 R. S. 1881, providing that upon the application of a drunkard, who is under guardianship, his property shall be restored and the guardian discharged, if such applicant shall show to the court by satisfactory evidence that he has reformed and has voluntarily refrained from the use of intoxicating liquors for at least one year preceding the application, some discretionary power is vested in the court to determine whether it has been satisfactorily shown that the inebriate has reformed and has voluntarily refrained from the use of liquor for at least one year preceding the application. *Rose v. Rose*, 441, 443 (1).

ELECTRICITY—

1. *Conflicting Uses.—Complaint.—Presumptions.*—In an action by a telephone company against an electric railway company for injury to plaintiff's lines resulting from the conduction or induction of electric current from defendant's trolley wires, it will be presumed, in the absence of any averments in the complaint to the contrary, that in the construction of its road defendant was simply carrying out the authority given it by the general laws of the State, that the road was built in a proper manner, and that it was being operated by the most improved method known to modern science, and with the highest degree of care.

Citizens Tel. Co. v. Fort Wayne, etc., R. Co., 230, 235 (4).

2. *Conflicting Uses.—Damages.—Complaint.—Sufficiency.*—A complaint by a telephone company against an electric railway company for injury to plaintiff's line by the conduction or induction of electric current from defendant's trolley wires, merely charging that defendant negligently and carelessly built and operated its railroad close to and parallel with plaintiff's telephone line, and that defendant could have constructed said railroad and trolley wire upon a route more distant so as not to interfere with the operation of such telephone line, was insufficient both on the theory of negligence and on that of an action at common law for maintaining a nuisance.

Citizens Tel. Co. v. Fort Wayne, etc., R. Co., 230, 233 (2), 235 (2).

3. *Conflicting Uses.—Liability.*—As a general rule, there is no liability resulting from conflicting uses of electricity, unless there has been negligence on the part of one of the conflicting users, but the rule is subject to the modification that a mere legislative grant must be exercised in strict conformity to private rights, and will not excuse one from liability where, without a just regard to the rights of others, he destroys and injures such rights to the extent of confiscation of property.

Citizens Tel. Co. v. Fort Wayne, etc., R. Co., 230, 237 (5).

4. *Occupation of Highways.—Telephones.—Railroads.*—The rights of a telephone company and a railroad company in the occupancy of a highway are co-ordinate and equal and, while each, in the use of its respective rights, is wholly independent of the other, neither owes any duty to the other beyond that of not carelessly, negligently, or maliciously interfering with the rights of the other.

Citizens Tel. Co. v. Fort Wayne, etc., R. Co., 230, 234 (3).

EMPLOYES—

Duty of railroad, see RAILROADS 9.

Youthful, see MASTER AND SERVANT 17.

Warning, see MASTER AND SERVANT 50, 51.

Of construction company, see RAILROADS 44-46.

EQUITABLE ESTOPPEL—

See ESTOPPEL 1.

EQUITY—

Will not enforce an alleged trust the nature of which is rendered obscure by time and acquiescence, see TRUSTS 2.

ESTOPPEL—

See DESCENT AND DISTRIBUTION 2.

1. *Equitable Estoppel.—Permitting Mortgage.*—Where a testatrix devised all her real estate to a son and daughter equally, and thereafter conveyed the real estate to the daughter who did not record the deed, and the daughter, after the death of the testatrix, joined the son in procuring the probate of the will, and with knowledge of the negotiations, but without disclosing the existence of the deed, permitted the son in good faith to obtain a loan secured by mortgage on the real estate, she is estopped from asserting her title as against the mortgagee.

Gwynn v. Wabash, etc., Trust Co., 391, 394 (3), 395 (3).

2. *Inconsistent Claims.—Set-off.—Evidence.*—Under evidence showing that plaintiff performed services for two canning factories, which, though under one management, were operated nominally as two companies, and that plaintiff's account ran against the first company, would warrant a conclusion that plaintiff was not in a position to assert a right to retain the proceeds of a car of corn, canned by the second company, in payment of commissions earned on sales made for the management of such factories, and at the same time deny defendant's right to the proceeds of such corn under an assignment made in the name of the first company on the theory that such assignment did not include the property of the second company.

Gilbert v. First Nat. Bank, 611, 617 (5).

EVIDENCE—

See APPEAL 11, 13, 15, 64, 81, 82, 89, 118, 119; ASSAULT AND BATTERY 3; ASSIGNMENTS 1, 2; BOUNDARIES 5, 6; COUNTIES 4; DEEDS 1, 6, 7; DRAINS; DRUNKARDS 1; ESTOPPEL 2; EXEMPTIONS; FRAUDULENT CONVEYANCES 4, 5, 9; INSURANCE 4, 8, 12; INTOXICATING LIQUORS 6-8; LIBEL AND SLANDER 2; MASTER AND SERVANT 9, 18, 24, 25, 28, 34-36, 39, 41; MECHANICS' LIENS 14, 15; NEW TRIAL 4; RAILROADS 11, 30, 32, 33, 38, 44-46, 52; TELEGRAPHS AND TELEPHONES 1, 7; TRIAL 2, 3, 5, 9, 11; TRUSTS 4.

Review as to, see APPEAL 47-57.

Where the transcript of the, is not in the record, there is no question before the court of its sufficiency, see APPEAL 3.

No question can be presented on appeal on the sufficiency of the, unless its insufficiency was assigned in the motion as a cause for new trial, see APPEAL 6.

EVIDENCE—Continued.

Where the transcript of the, is not in the record, the specification in the motion for new trial, that the decision of the court is contrary to law, presents the same question as that raised by appellant's exceptions to the conclusions of law, see *APPEAL 25*.

1. *Admission*.—The statement made by defendant's attorney that no evidence would be introduced to dispute the location of certain corner stones did not amount to an admission that such stones were correctly located. *North v. Jones*, 203, 215 (13).
2. *Admissibility*.—*Surveys*.—Evidence of certain surveys would be inadmissible over proper objections on the ground that neither the records of the surveys, nor any other evidence introduced, showed that any of the adjacent landowners had any notice of any of said surveys, or that they in any way participated in or consented to the making of such surveys. *Wagner v. Meyer*, 223, 224 (2).
3. *Burden of Proof*.—*Presumptions*.—Where a party has the burden of proof upon a given issue and a rebuttable presumption arises in his favor, either as a result of evidence introduced or from facts judicially known by the court, such presumption will prevail in his favor until it is met and rebutted by evidence, but, while in such case the burden of going forward with the evidence devolves upon his adversary, the burden of the issue does not shift. *North v. Jones*, 203, 212 (6).
4. *Expert Evidence*.—*Lighting of Theatre*.—In an action for injuries to plaintiff caused by defective steps in the aisle of a theatre building, where the theory of the defense was that it had provided sufficient lamps to light the theatre, it was proper to ask an expert witness for plaintiff on direct examination as to whether there was a better way to locate the light for the purpose of distributing it in and around the steps. *Valentine Co. v. Sloan*, 69, 73 (4).
5. *Judicial Notice*.—The court takes judicial notice of the rules governing the survey of public lands. *North v. Jones*, 203, 211 (5).
6. *Ownership of Note*.—*Assessment Sheets*.—In an action by the widow and only son of a deceased payee of a note, assessment sheets showing that the note had not been listed by the payee were admissible in evidence on the question of the ownership of the note. *Myers v. Manlove*, 327, 334 (7).
7. *Parol Evidence*.—*Written Contract*.—Where a written contract appears to be complete, it is presumed to be the repository of the final intention and agreement of the parties, and it cannot be changed, modified, added to or subtracted from by proof of any prior or contemporaneous parol agreement, except as to the consideration, which may be contradicted by parol, unless from the language of the writing it appears that the stipulation as to the consideration is contractual. *Wabash R. Co. v. Grate*, 583, 595 (5).
8. *Preponderance*.—*Burden of Proof*.—*Presumptions*.—The duty of producing a preponderance of the evidence upon a given issue always rests upon the party having the affirmative of such issue, and the burden of proof cannot be changed or shifted by any presumption that may arise during the introduction of the evidence. *North v. Jones*, 203, 212 (7).
9. *Presumptions*.—*Failure to Produce Evidence*.—Where a party to an action has at his command testimony presumably favorable to himself, his failure to produce the same warrants the presumption that such testimony if produced would be unfavorable to him. *Judy v. Jester*, 74, 89 (11).

EVIDENCE—Continued.

10. *Res Gestae.—Declarations of Agent.*—The declarations of an agent while actually transacting the business which his principal authorized him to transact are admissible as a part of the *res gestae*.
Snyder v. Frank, 301, 309 (3).
11. *Weight and Sufficiency.—Expert Testimony.*—The weight to be given to expert testimony is for the jury to determine.
Kelly-Atkinson Constr. Co. v. Munson, 619, 628 (11).
12. *Weight and Sufficiency.*—Where the evidence is of any probative force whatever, the weight to be given thereto, and the inferences to be drawn therefrom, are matters for the jury.
Toledo, etc., R. Co. v. Home Ins. Co., 459, 465 (6).
13. *Weight and Sufficiency.—Duty of Court.—New Trial.*—The weight of the evidence is for the jury, but if it makes a mistake where the evidence is conflicting the trial court should grant a new trial.
New Albany, etc., Mills Co. v. Senior, 453, 457 (7).

EXCEPTIONS—

To conclusions of law, see APPEAL 124, 125.

The final report of an executor and the, thereto stand as the complaint and answer of the respective parties, see EXECUTORS AND ADMINISTRATORS 4.

EXCEPTIONS, BILL OF—

See APPEAL 26.

EXECUTION—

Sale, see EXEMPTIONS 1-3.

Of deed to correct prior deed, see DEEDS 8.

EXECUTORS AND ADMINISTRATORS—

See FRAUDULENT CONVEYANCES 1.

1. *Appointment.—Rights of Creditors.*—A creditor of a decedent's estate has a right to demand that an administrator shall be appointed and that the estate shall be settled in the mode prescribed by statute, even though there may be no great necessity for such appointment.
Holz v. Mercantile, etc., Sav. Co., 194, 200 (4).
2. *Appointment.—Annulment of Letters.*—The fact that the heirs of a decedent, after the appointment of an administrator for his estate, paid the amount of a judgment, the only debt of decedent, into the court in which it had been rendered, could not operate to take from the court appointing the administrator the power to make such appointment, or compel the annulment of the letters issued, but was a fact for the consideration of such court in the exercise of its discretionary power.
Holz v. Mercantile, etc., Sav. Co., 194, 200 (5).
3. *Appointment.—Review.*—While §2737 Burns 1908, Acts 1901 p. 281, is mandatory in its provision that the widow or next of kin of a decedent, if qualified, shall be appointed as administrator if application for such appointment is made within twenty days from the death of the decedent, after the lapse of such twenty days, if no appointment has been made and a necessity therefor exists, the court is given a discretionary power by subd. 4 of said section to appoint any competent person of the county, and the exercise of such power will not be disturbed on appeal unless there has been a clear abuse thereof.
Holz v. Mercantile, etc., Sav. Co., 194, 199 (3).

EXECUTORS AND ADMINISTRATORS—Continued.

4. *Final Report.—Exceptions.*—The final report of an executor and the exceptions thereto stand as the complaint and answer of the respective parties. *Shuey v. Lambert*, 567, 572 (5).
5. *Final Report.—Exceptions.—Findings.*—The rule that the failure of the court, in making a special finding, to find a material fact is the equivalent of finding such fact against the party having the burden of proving the same, is applicable to a trial of the exceptions to the final report of an executor. *Shuey v. Lambert*, 567, 573 (6).
6. *Final Report.—Exceptions.—Sufficiency.*—Exceptions by a husband to the final report of the executor under the will of his deceased wife, denying the executor's right to credit for certain expenses of last sickness and funeral incurred without the knowledge or consent of the husband, and for the payment of the debts of the estate and costs of administration, as against such husband's one-third interest in the proceeds of the sale of his wife's real estate, were sufficient to challenge the executor's right to obtain credit for the several items so as to reduce the amount due such husband below such one-third. *Shuey v. Lambert*, 567, 571 (1).
7. *Exceptions to Final Report.—Amended Report.—Effect.*—Where exceptions are sustained to the final report of an executor, his amended report, filed in obedience to the order of the court, is not filed in the sense of an amended pleading, but such report as amended and approved by the court is in fact the judgment of the court, so that exceptions to the conclusions of law stated on the trial of exceptions to a final report are effective to test the correctness of such conclusions on any question raised by the exceptions to such report, unless the amendments ordered and made have cured the error, if any, shown by such original exceptions. *Shuey v. Lambert*, 567, 572 (2).
8. *Final Report.—Claims for Credits.*—The claims of an executor in his final report for credits against the funds of the estate are in the nature of separate complaints, or allowances, and exceptions thereto place the burden on the executor to establish by competent evidence the correctness of his report as to all matters embraced in such exceptions. *Shuey v. Lambert*, 567, 572 (4).
9. *Objections to Approval of Amended Report.—Motion for New Trial.*—The correctness of the court's approval of the amended final report of an executor may be tested by a motion for a new trial on the ground that the decision of the court is not sustained by sufficient evidence and is contrary to law. *Shuey v. Lambert*, 567, 572 (3).

EXEMPTIONS—

1. *Execution Sale.—Transfer of Property Exempt.*—Where a judgment is founded on contract, the judgment debtor, if a resident householder, and his entire estate does not exceed in value the amount which he is authorized to claim as exempt from sale on such judgment, may, before such sale occurs, sell or dispose of any or all of his property and the purchaser will take it free from the lien of the judgment, or the lien of any execution that may have been issued thereon. *Kirk v. Macy*, 17, 21 (3).
2. *Execution Sale.—Transfer of Exempt Real Estate.—Rights of Purchaser.—Quieting Title.*—Where a judgment debtor on a judgment founded on contract, who is a resident householder and whose entire estate does not exceed in value the amount which he is authorized to claim as exempt from sale on such judgment, disposes of any of his real estate before such sale occurs, the purchaser may maintain

EXEMPTIONS—Continued.

an action to quiet his title against the lien of the judgment, if he commences his suit before such real estate is sold under the judgment.

Kirk v. Macy, 17, 21 (4).

3. *Execution Sales.—Statutes.—Construction.*—Although §756 Burns 1908, §714 R. S. 1881, providing that, to be entitled to the benefit of exemption from execution sale, the judgment debtor should make out and deliver to the officer holding the writ a sworn inventory of all his property, the law that exempts from sale on execution is to be liberally construed and its application is not limited to cases which fall directly within its strict letter, but is extended to all cases that come within the spirit and equity of the law, so as to promote and secure the object intended. *Kirk v. Macy*, 17, 20 (2).

4. *Quieting Title to Property Purchased Before Execution Sale.—Complaint.—Evidence.—Admissibility.*—In an action brought before execution sale to quiet title to real estate purchased from the judgment debtor, evidence of the value of the debtor's property was admissible under the allegations of the complaint that the judgment was not and had at no time been a lien on such real estate.

Kirk v. Macy, 17, 22 (8).

5. *Quieting Title to Property Purchased Before Execution Sale.—Evidence.—Sufficiency.*—In an action brought before execution sale to quiet title to real estate purchased from the judgment debtor, evidence showing that the debtor's interest in real property was worth less than \$600 and that he had no unincumbered personal property, but not showing that he did not have incumbered personal property of sufficient value to defeat his claim to exemption, is insufficient to sustain a finding and judgment for plaintiff.

Kirk v. Macy, 17, 23 (10).

6. *Quieting Title to Property Purchased Before Execution Sale.—Complaint.—Sufficiency.—Allegations as to Schedule.*—In an action brought before execution sale to quiet title to real estate purchased from a judgment debtor, and which such debtor could have claimed as exempt from sale on execution, a complaint alleging that such judgment "is not and at no time has been a lien upon said real estate, or upon any interest therein," was sufficient without alleging that plaintiff had filed a schedule showing the value of the debtor's property, since the filing of such schedule is not essential to maintaining the action.

Kirk v. Macy, 17, 22 (6).

7. *Rights of Purchaser of Exempt Real Estate.—Quieting Title.—Equitable Principles.*—The right of the purchaser of real estate, which the vendor could have claimed as exempt from sale on execution, to maintain an action commenced before the execution sale to quiet his title thereto as against the judgment lien rests on equitable principles.

Kirk v. Macy, 17, 22 (5).

EXPERT TESTIMONY—

The weight to be given to, is for the jury to determine, see EVIDENCE 11.

EXTRADITION—

1. *Right to Send Fugitive Out of State.*—A fugitive from another state may not lawfully be sent out of this State until identified by a court designated in the statute. *Vollmer v. Board, etc.*, 149, 155 (5).
2. *Identification of Fugitive.—Statutes.—Justices of the Peace.*—The authority granted by §§1900-1903, 1905, 1907 Burns 1908, dealing

EXTRADITION—Continued.

with the procedure in the apprehension and identification of fugitives from justice from other states found in this State, and authorizing the necessary steps to be taken before any "court, judge or justice of the peace authorized to issue warrants in criminal cases," does not authorize the identification of the accused before a justice of the peace after he is in custody on the warrant of the Governor of this State.
Vollmer v. Board, etc., 149, 154 (3).

3. *Expenses of Officer.—Statutes.—“Judge.”—“Justice of the Peace.”*—Construing as a whole the statutory provisions relating to the apprehension and extradition of fugitives from justice (§§1892-1909 Burns 1908), it was not the legislative intent in the act of March 5, 1909 (Acts 1909 p. 165), amendatory of §42 of the act of March 10, 1905 (Acts 1905 p. 584, §1909 Burns 1908), to include justices of the peace as "judges" before whom the proceedings provided by said section are authorized for the apprehension of fugitives from justice who are beyond the State, so that where such proceedings were had before a justice of the peace, his certification of the expenses incurred in apprehending and returning the fugitive did not create any demand against the county.

Vollmer v. Board, etc., 149, 154 (4), 155 (4).

FALSE REPRESENTATIONS—

See FRAUD 4.

FEDERAL COURTS—

The mode of service prescribed by the laws of a state for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid obtains similar recognition in the federal courts, in so far as the same affects property of foreign corporations within such state, see CORPORATIONS 14.

FEES—

See CLERKS OF COURTS.

For naturalization, see ALIENS 1-3.

FELLOW SERVANT—

Negligence of, see MASTER AND SERVANT 5, 27, 28, 30.

FINDINGS—

See TRIAL.

FIRE INSURANCE—

See INSURANCE 2-12.

FIRES—

See RAILROADS 26-32.

FORECLOSURE—

Of mortgages, see MORTGAGES 1.

Of mechanics' liens, see MECHANICS' LIENS 4-13.

FOREIGN CORPORATIONS—

See CORPORATIONS 5-15.

Mode of service on, see CONSTITUTIONAL LAW 2.

FRAUD—

1. *Conveyance Obtained by Fraud.—Action for Damages.—Complaint.—Parties.—Husband and Wife.*—A complaint alleging facts showing that a husband was defrauded out of land, the title to which was in his name, and in the conveyance of which his wife joined, shows such an interest in the wife as makes her a proper party plaintiff with her husband in a suit to recover damages for such alleged fraud. *Judy v. Jester*, 74, 85 (5).
2. *Action.—Complaint.*—A complaint by a property owner against a railroad company for damages resulting from defendant's removal of its shops, etc., to another city, is insufficient on the theory of fraud, notwithstanding some of its averments indicate that it proceeds on the theory that plaintiff was induced to purchase his property by defendant's fraudulent representations, where it contains no averments that such representations were false, or that they were fraudulently made knowing them to be false, or that they were recklessly made not knowing whether they were true, or that they were made for the purpose of cheating or defrauding plaintiff. *Wabash R. Co. v. Grate*, 583, 588 (1), 589 (1).
3. *Representations of Value.*—Although representations as to value are not ordinarily sufficient to support a charge of fraud, where the vendor of real estate assumes to have special knowledge of the value of the property, and knows that the vendee is ignorant of the value and inexperienced, and that he is trusting entirely to the good faith and judgment of the vendor, the vendor's representations of value, made under such circumstances as the basis for a contract between the parties, may be regarded as representations of material facts. *Judy v. Jester*, 74, 86 (6).
4. *False Representations.—Existing or Past Facts.—Representations as to Future Acts.*—Alleged statements, representations, acts and conduct which were not made with reference to an alleged existing or past fact, but which relate to and are representations, statements and conduct with reference to a thing to be done in the future, are insufficient grounds on which to predicate fraud. *Wabash R. Co. v. Grate*, 583, 589 (2).
5. *Fraudulent Representations.—Liability.*—Defendant in an action for damages for fraud practiced on plaintiff in the exchange of real estate, cannot escape liability, where he assumed to know the facts and made false statements of material matters to induce plaintiff to make the trade, knowing that the statements were false and that plaintiff was relying upon their truthfulness, and by his management, connivance, trickery and overpowering influence, induced plaintiff to rely on same and prevented him from investigating to ascertain the facts. *Judy v. Jester*, 74, 88 (10).
6. *Fraudulent Representations.—Complaint.—Sufficiency.—Findings.*—In an action for damages for fraud perpetrated in an exchange of real estate, where the allegations of the complaint, and the findings of fact in support thereof, showed that defendant stated that his land was first-class agricultural land, composed of black loam with a clay subsoil and was suitable for the raising of all kinds of grain, that the whole farm was as good as the small portion pointed out to plaintiff, that the soil was as deep and as good and of the same quality as that of a farm previously examined by plaintiff, and as good in every particular, and that the farm had deep and productive soil over all its surface except about three acres, and that the statements were knowingly and falsely made for the purpose of defrauding plaintiff, fraud was sufficiently shown. *Judy v. Jester*, 74, 87 (7).
7. *Reliance on Fraudulent Representations.*—While one may not rely upon the truth of a statement which he knows to be untrue, or which

FRAUD—Continued.

is manifestly false, he may rely on the express statement of an existing fact, the truth of which is unknown to him, but which is asserted by the other party as a basis for mutual agreement.

Judy v. Jester, 74, 87 (8).

8. *Reliance on Fraudulent Representations.—Negligence of Party Defrauded.*—Where it was shown that plaintiff was taken into a section of country in which he was unacquainted, that his credulity, ignorance of values and inexperience were known to defendant, that after looking at one farm with a view of trading for it defendant took him to another which he only casually observed with no idea or intention of purchasing, that on the way back to the station defendant made representations as to the latter farm and of helpful advice given to other persons in similar transactions, and thus induced the plaintiff to suggest a trade for the latter farm, that they were traveling in the night, and that early the next morning plaintiff was at home sixty miles away, but that he was still under the influence and domination of defendant, and without convenient means to learn the facts for himself, it cannot be said as a matter of law, that he was so negligent as to bar his right to recover for the fraud practiced on him.

Judy v. Jester, 74, 88 (9).

FRAUDULENT CONVEYANCES—

See HUSBAND AND WIFE 6.

1. *Action by Administrator to Set Aside Conveyance of Decedent.—Complaint.—Necessary Allegations.*—In an action by an administrator, on behalf of the creditors of the estate, to set aside the fraudulent conveyance of the decedent, it is necessary to aver that at the time of the conveyance the decedent was insolvent and did not have enough property subject to execution to pay his then existing debts, and that he had no property subject to execution when the suit was brought.
Larch v. Holz, 56, 59 (1).
2. *Complaint.—Sufficiency.—Supplemental Complaint.*—A supplemental complaint relates back to the filing of the original complaint, so that where the original complaint in an action to set aside a fraudulent conveyance alleged that the defendant had no other property at the time of such conveyance, or at the time of the commencement of the action out of which plaintiff's debt could be made, a supplemental complaint filed after the defendant's death, and on the substitution of his administrator as a defendant, was not objectionable on the ground that it failed to aver what property the decedent owned at the time of his death, or that his administrator did not have on hand sufficient assets to pay decedent's debts.
Larch v. Holz, 56, 59 (2).
3. *Extent of Invalidity.*—A conveyance, made for the fraudulent purpose of cheating, hindering and delaying the creditors of the grantor, is void in its entirety.
Larch v. Holz, 56, 65 (5).
4. *Evidence.—Sufficiency.*—Evidence is insufficient to sustain the setting aside of a mortgage on the ground that it is a fraud against creditors, where it is not shown that the mortgagor had no other property subject to execution.
Larch v. Holz, 56, 68 (11).
5. *Sufficiency of Evidence.—Fraud.*—In an action to set aside as fraudulent a mortgage executed by the debtor to his mother on his interest in real estate left by his father, where it affirmatively appears from the evidence that the mortgage was executed to secure a *bona fide* indebtedness due to his mother, that the mortgage was agreed upon before it was known by either of them that the plaintiff had not filed his note as a claim against the estate of the debtor's father,

FRAUDULENT CONVEYANCES—Continued.

who had been surety for the debtor on the note held by plaintiff, that at the time of executing the mortgage neither the debtor nor his mother knew that it would in any way affect the collection of plaintiff's note, and that the mortgage was taken by the mother for the purpose of preventing litigation and to make herself safe, there is no fraud shown to support a judgment for plaintiff.

Larch v. Holz, 56, 60 (3), 63 (3), 67 (3).

6. *Failure to Record Deed.—Effect.*—Special findings that a testatrix, after devising all her real estate to a son and daughter, conveyed the same to her daughter, that the latter did not record the deed or disclose its existence, but after the death of the testatrix joined her brother in procuring the probate of the will and thereafter permitted him in good faith to obtain a loan secured by mortgage on the real estate, presents a case within the spirit of §3962 Burns 1908, §2931 R. S. 1881, providing that every conveyance not recorded within forty-five days from date of execution shall be fraudulent and void as against any subsequent *bona fide* purchaser, lessee or mortgagee, so that such deed must be deemed fraudulent as against the mortgagee. *Gynn v. Wabash, etc., Trust Co.*, 391, 395 (5).
7. *Fraudulent Grantee.—Trusts.*—A fraudulent grantee holds the land, conveyed to him in fraud of the grantor's creditors, in trust for such creditors. *Darby v. Vinnedge*, 525, 534 (7).
8. *Fraud.—Burden of Proof.*—Fraud is never presumed, but the burden of proving it is upon him who alleges it, so that the burden is upon one who claims that a conveyance was in fraud of creditors to show that fact. *Larch v. Holz*, 56, 65 (6).
9. *Fraud.—Evidence.*—Knowledge on the part of a creditor of the existence of other debts at the time of accepting a mortgage to secure his claim, and that such other creditors had taken no steps to collect or secure their claims, and that the acceptance of such mortgage would render the other debts impossible of collection, would not be evidence of fraud, if the debt for which the mortgage was given was *bona fide*. *Larch v. Holz*, 56, 67 (10).
10. *Preferences.*—An insolvent debtor may lawfully prefer one or more of his creditors by payment, mortgage, pledge or deed, to the exclusion of the others, and the validity of such preference is not affected by the fact that the preferred creditor is a near relative of the debtor. *Larch v. Holz*, 56, 66 (8).
11. *Preferences.*—The fact that the giving and acceptance of a mortgage or other security, given to secure an honest debt and in good faith accepted for that purpose, operates to defeat the claims of other creditors, affords no grounds for complaint on the part of the latter. *Larch v. Holz*, 56, 65 (7).
12. *Preferences.—Right of Creditor to Procure Preference.*—In the absence of statutory prohibition, it is neither a legal nor moral wrong for a creditor, even with knowledge that other creditors will be deprived of obtaining payment of or security for their claims, to obtain payment of or security for his honest claim, and he is not bound to abate any degree of vigilance in doing so, in order to give some other creditor an equal chance. *Larch v. Holz*, 56, 66 (9).

FRAUDULENT REPRESENTATIONS—

See FRAUD 5-8.

FUNERAL EXPENSES—

See DESCENT AND DISTRIBUTION 3.

GIFTS—

Gifts Inter Vivos.—Delivery.—Action.—Where a decedent executed deeds to his real estate and assigned notes, certificates of deposit and stock certificates, and placed them in separate envelopes addressed to his several children, and delivered the envelopes to another to be delivered to the children after his death, the children took by gift *inter vivos*, so that in an action on one of the notes, the plaintiff sued as his father's donee *inter vivos*, and not as a devisee or heir in his estate. *Snyder v. Frank*, 301, 305 (1).

GUARDIAN AND WARD—

See APPEAL 19.

Discharge of guardian, see DRUNKARDS 2, 3.

HARMLESS ERROR—

See APPEAL 78, 107-121; CARRIERS 6.

HIGHWAYS—

Tracks in, see RAILROADS 53, 54.

Injury to travelers on, see NEGLIGENCE 17.

Occupation of, by telephone company and railroad company, see ELECTRICITY 4.

HUSBAND AND WIFE—

See DESCENT AND DISTRIBUTION 1-4; FRAUD 1.

Under §3016 Burns 1908, a surviving husband acquires one-third of his deceased wife's real estate free from her postnuptial debts, see DESCENT AND DISTRIBUTION 1.

1. *Wife's Inchoate Interest in Husband's Lands.—Nature of Interest.*—The wife's interest in her husband's real estate is an estate in the land itself, and not a mere encumbrance resting upon it. *Judy v. Jester*, 74, 85 (3).
2. *Rights of Wife in Husband's Real Estate.*—The law looks with favor upon the wife's interest in her husband's real estate, as well as upon her marital rights as widow in such real estate. *Darby v. Vinnedge*, 525, 532 (1).
3. *Rights of Wife in Husband's Real Estate.—Tax Liens.*—The widow of a deceased husband or the wife of a judgment debtor, is entitled to have a lien for taxes against the property owned by the husband paid out of the two-thirds of his lands. *Darby v. Vinnedge*, 525, 533 (4).
4. *Lands Purchased on Contract.—Rights of Wife.—Enforcement of Vendor's Lien.*—A wife may claim her one-third in lands purchased by the husband on contract, and may compel the holder of the vendor's lien to exhaust the husband's two-thirds before selling her one-third. *Darby v. Vinnedge*, 525, 533 (3).
5. *Conveyances.—Release of Wife's Inchoate Interest.—Presumptions.*—A wife's release of her inchoate interest in her husband's land may be a valuable consideration for a promise to her; and it will be presumed, in the absence of any agreement to the contrary, that the inducement for her releasing such inchoate right by joining the husband in a conveyance of his land, as to the grantee, was the consideration paid by the latter for the land conveyed. *Judy v. Jester*, 74, 84 (2).

HUSBAND AND WIFE—Continued.

6. *Fraudulent Conveyances.—Setting Aside Conveyance.—Rights of Grantor's Wife.—Street Improvement Liens.*—Where a conveyance by husband and wife was set aside as fraudulent as against his creditors, and the real estate was sold at judicial sale to the creditors, subject to the rights of the wife, but prior to the proceedings to set aside such conveyance, the fraudulent grantee had signed a waiver in order to procure the privilege of paying an assessment lien for street improvements in installments, such wife, as against the creditors, could compel the sale of the interest of such creditors and the application of the proceeds to the payment of such lien before resorting to her interest for its payment.

Darby v. Vinnedge, 525, 533 (6), 534 (6).

IDEM SONANS—

See NAMES.

IDENTIFICATION—

Of fugitive, see EXTRADITION 2.

IMPROVEMENTS—

Public, see MUNICIPAL CORPORATIONS 1-6.

Street, see MUNICIPAL CORPORATIONS 7.

INJUNCTION—

1. *Right to Relief.—Continuous Trespass.—Inadequacy of Legal Remedy.*—Injunctive relief may be granted, even though plaintiff may have a legal remedy, if the trespass is continuous in its nature, or consists of constantly recurring acts, which would render resort to the legal remedy impractical because of a multiplicity of suits and the consequent smallness of the damages that could be recovered in each case when compared with the expense entailed.

Knickerbocker Ice Co. v. Surprise, 286, 291 (2).

2. *Inadequacy of Remedy at Law.—Complaint.—Sufficiency.*—A complaint, alleging that plaintiff is the owner of certain real estate, a part of which is covered by water on which ice forms, that defendant is engaged in cutting and removing ice, that from time to time in past years the defendant has cut and removed ice on plaintiff's land, and is now engaged in cutting and removing ice therefrom, and that unless defendant is restrained its acts will make necessary a multiplicity of suits, and that the enforcement of plaintiff's rights at law or by criminal prosecutions would produce breaches of the peace and other improper conditions, states facts showing that plaintiff has no adequate remedy at law, and is sufficient to entitle him to injunctive relief. *Knickerbocker Ice Co. v. Surprise*, 286, 291 (1).

INNUENDO—

See LIBEL AND SLANDER 1.

INSPECTION—

Duty of, see MASTER AND SERVANT 29.

INSTRUCTIONS—

See TRIAL.

INSURANCE—

1. *Action.—Complaint.—Sufficiency.—Performance of Conditions.*—A complaint on an accident insurance contract which sets out the contract as an exhibit and alleges generally the performance of all the conditions thereof by the plaintiff, and also states the time, place and nature of the injury suffered by plaintiff, was sufficient to withstand a demurrer.
Federal Casualty Co. v. Taylor, 565, 566 (1).
2. *Fire Insurance.—Complaint.—Sufficiency.*—A complaint on a fire policy alleging that on a certain day the insured "gave the defendant company due notice of proof of said fire and also he has duly performed on his part all the conditions required by said policy of insurance," sufficiently avers a performance of the conditions of the policy. *Manufacturers Mut. Fire Ins. Co. v. Swaney*, 429, 432 (3).
3. *Fire Insurance.—Complaint.—Sufficiency.—Initial Attack on Appeal.*—In an action on a fire insurance policy, the complaint alleging that on a certain day the insured was the owner of certain property and that defendant on that day executed and delivered a policy of insurance thereon, and that a number of days thereafter the property was destroyed by fire, though perhaps insufficient to withstand a demurrer for failure to directly aver that insured was the owner of the property at the time of the fire, is sufficient as against objection presented for the first time on appeal.
Manufacturers Mut. Fire Ins. Co. v. Swaney, 429, 433 (4).
4. *Fire Insurance.—Evidence.—Admissibility.*—In an action on a fire policy, testimony of plaintiff showing knowledge of her title by the broker, through whom the insurance was placed, was admissible, since knowledge by him of facts relating to the validity of the policy is imputed to the company. *Western Ins. Co. v. Ashby*, 518, 524 (7).
5. *Fire Insurance.—Insurance Brokers.—Knowledge.*—An insurance broker, acting within the scope of his authority, is the agent of the company from which he procures insurance, and his knowledge relating to the risk is binding on the company, though not communicated to it.
Western Ins. Co. v. Ashby, 518, 523 (4).
6. *Fire Insurance.—Condition Avoiding Policy.—Waiver.*—An insurance company, having knowledge of facts which would enable it to avoid the policy by requiring proof of loss in the event of a loss, and by failing to give timely notice of its election to avoid, waives the right to defeat recovery by reason of such facts.
Western Ins. Co. v. Ashby, 518, 524 (5).
7. *Fire Insurance.—Condition Avoiding Policy.—Construction.—Waiver.*—A provision in a fire policy that it shall be void upon certain conditions, means that the policy is voidable at the option of the insurer, and unless the insurer, on learning of the conditions, acts with reasonable promptness in notifying the insured of its election to avoid the policy and in restoring or offering to restore the unearned premium, it thereby waives its right to declare the policy void.
Western Ins. Co. v. Ashby, 518, 523 (3).
8. *Fire Insurance.—Waiver of Conditions.—Evidence.*—In an action on a fire policy, evidence that the insurance broker knew that plaintiff's title to personal property covered by the policy was not absolute, and that the agents who issued the policy had knowledge of the property and knew that such policy and another covered the same property, and that it was through the oversight of such agents that permission to carry other insurance was not inserted in the policy sued on, warranted the jury in finding that defendant had waived any condition in the policy by which it might have avoided liability.
Western Ins. Co. v. Ashby, 518, 524 (6).

INSURANCE—Continued.**9. Conditions.—Proofs of Death.—Time for Bringing Suit.—Waiver.—**

Where an insurance company, after twice receiving notice of the death of the insured, wrote the beneficiary that the policy would be paid as soon as the company could take action on it, and that litigation would only complicate matters, it thereby waived conditions in the policy requiring the proofs of death to be made on blanks furnished by the company, and limiting the time for suing thereon.

Continental Casualty Co. v. Hunt, 657 (1).

10. Fire Insurance.—Stipulations Against Assignment.—Operation.—

The provision of a fire policy against assignment before a loss, is not violated unless there has been a transfer, either in writing or by actual delivery, and in the absence of such a transfer, the mere promise of the assured before a loss to assign the policy, together with his statement after the loss that he had assigned same, will not avoid the policy.

Manufacturers Mut. Fire Ins. Co. v. Swaney, 429, 435 (9).

11. Fire Insurance.—Stipulations Against Incumbrances.—Waiver.—

Where there is no written application for insurance, and no questions are asked, and no statements are made by the insured, and he has no knowledge that the existence of a mortgage will avoid the policy, the issuance of the policy is a waiver of the provisions for forfeiture by reason of existing incumbrances.

Manufacturers Mut. Fire Ins. Co. v. Swaney, 429, 435 (8).

12. Fire Insurance.—Stipulations Against Incumbrances.—Evidence.—

Evidence showing that there was a real estate mortgage on the property at the time it was insured, but failing to show that the property was at any time encumbered by a chattel mortgage, or that it was encumbered subsequently to the issuing of the policy by a real estate mortgage, is insufficient to show a cancellation of a policy containing a provision that "any subsequent mortgage or encumbrance on any property insured under this policy, unless consent of the company is endorsed hereon, cancels and annuls this policy absolutely, * * * or if the subject of insurance be personal property and be or become encumbered by chattel mortgage."

Manufacturers Mut. Fire Ins. Co. v. Swaney, 429, 434 (7).

INTENT—

Legislative, see **STATUTES** 3, 5.

Of grantor, see **DEEDS** 4, 5.

INTEREST—

Conveyed, see **DEEDS** 3.

Right to Recover.—Review on Appeal.—Where there has been a vexatious delay in the payment of an amount due, interest may be charged from the date when due, so that in an action for the recovery of a sum alleged to be due plaintiff, where there was some evidence warranting the trial court in finding that there had been vexatious delay, its action in allowing interest will not be disturbed on appeal.

Gynn v. Daugherty, 598, 604 (4).

INTER VIVOS—

Gifts, see **GIFTS**.

INTERURBAN—

Railroads, see **RAILROADS** 49-51.

INTOXICATING LIQUORS—

1. *Forfeiture of License.—Liability of Surety on Dealer's Bond.*—The forfeiture of a retail liquor dealer's license does not operate to relieve such dealer or his bondsmen from liability for damages resulting from an unlawful sale thereafter made under color of such license.
Lawlor v. State, ex rel., 24, 30 (10).
2. *Removal of Dealer.—Forfeiture of License.*—Removal from the State by one holding a retail liquor dealer's license works a forfeiture thereof, and it will thereafter afford no protection to a person who sells intoxicating liquors assuming to act as the agent of the owner of such license.
Lawlor v. State, ex rel., 24, 30 (9).
3. *Rights of Dealer.—Sale of Stock and Fixtures.*—The owner of a saloon may lawfully sell the stock and fixtures and quit the business.
Lawlor v. State, ex rel., 24, 29 (7).
4. *Rights of Dealer.—Transfer of License.*—Prior to the act of 1911 (Acts 1911 p. 244), the statutes provided no means by which the holder of a license to conduct a saloon could transfer that license to another.
Lawlor v. State, ex rel., 24, 29 (8).
5. *Sale of Business.—Sales Under Color of License.*—Where the holder of a saloon license sells his stock and fixtures to another who takes possession and operates the saloon on his own account at the place described in the license of the seller, such acts alone do not amount to conducting the business under color of the license of the seller, so as to render him and his bondsmen liable for damages resulting from illegal sales made by the purchaser.
Lawlor v. State, ex rel., 24, 32 (12).
6. *Unlawful Sales.—Action for Damages.—Principal and Agent.—Sale by Agent.—Evidence.*—In an action on a liquor dealer's bond to recover for injury to means of support by the unlawful sale of liquor, evidence showing that a license was issued to the dealer to conduct a saloon where the liquor was sold, that a saloon was opened and conducted at that place, and that the sale complained of was made by a person in charge within the term covered by the license, is sufficient *prima facie* to show that the place was conducted under the license granted to such dealer, and that the person in charge was his agent or employe.
Lawlor v. State, ex rel., 24, 27 (2).
7. *Unlawful Sales.—Action for Damages.—Evidence.—Sufficiency.*—In an action on a liquor dealer's bond for injury to means of support by the unlawful sale of liquor, evidence, though conflicting, which showed that the husband and father of the plaintiffs had been drinking intoxicants before going to the saloon, that he remained in the saloon about four hours, playing cards and drinking at intervals, that he was so drunk that he staggered and fell to the ground when he was put out of the saloon, that as he walked toward the railroad he staggered, and that shortly afterwards his mangled body was found on the railroad tracks, was sufficient to warrant the jury in finding that his death resulted as a consequence of his intoxication.
Lawlor v. State, ex rel., 24, 27 (1).
8. *Unlawful Sales.—Action for Damages.—Evidence.—Prima Facie Case.—Rebuttal.*—Where, in an action on a liquor dealer's bond for injury to means of support by the unlawful sale of liquor, the evidence showed *prima facie* that the place where liquor was sold was conducted under the license issued to the defendant dealer and that the person in charge was his agent or employe, the question of whether a bill of sale introduced in evidence, and the testimony of the person in charge that on the date shown by such bill of sale he had purchased the saloon and had since conducted it on his own accord and that immediately after such purchase the defendant dealer removed his license and left the State, but which was in

INTOXICATING LIQUORS—Continued.

part discredited by the testimony of another witness showing that the bill of sale was not executed on the date which it bore, was sufficient to rebut the *prima facie* case made by plaintiffs, was for the jury, and it cannot be held on appeal that its finding for plaintiffs on such questions is not warranted by the evidence.

Lawlor v. State, ex rel., 24, 28 (3), 29 (3), 30 (3).

9. *Unlawful Sales.—Action for Damages.—Instructions.*—In an action on a liquor dealer's bond for damages growing out of the unlawful sale of liquor, an instruction that if the jury finds from the evidence that by reason of the acts of the defendants themselves, or of any of them, by and with the knowledge and consent of the others expressed or implied, the license issued to the defendant dealer became inoperative and void, but that the unlawful sale, if any, was made by a person in charge of the saloon under color of such void license, defendants are estopped from asserting the invalidity of such license as a defense, was erroneous, since it warranted the jury in concluding that defendants were estopped to assert the invalidity of the license, without finding as a fact that the person in charge was acting as the agent of the defendant dealer, or that such defendant and his bondsmen had any knowledge that the business was being conducted under color of the license granted to him.

Lawlor v. State, ex rel., 24, 30 (11), 32 (11), 34 (11).

"JUDGE"—

See WORDS AND PHRASES.

"JUDGES"—

See WORDS AND PHRASES.

Judge Pro Tem.—Appointment.—Validity.—Failure to Sign Order of Appointment.—The failure of the qualified and acting judge of a court to sign the order appointing a judge *pro tem.* does not render such appointment a nullity.

Isgrig v. Franklin Nat. Bank, 217, 219 (1).

JUDGMENT—

See APPEAL 4, 14, 47-50, 74-77; NUISANCE 1.

Acceptance of benefits of, see APPEAL 18, 19.

Erroneous, see APPEAL 129.

In rem, see PROCESS 1.

Lien, see MORTGAGES 2, 3.

Personal, see PROCESS 2.

Motion in arrest of, see NEW TRIAL 3.

To set aside, by default, see APPEAL 126.

Ruling on motion for, on answers to interrogatories, see APPEAL 92.

An appeal does not lie from an order vacating a, see APPEAL 2.

1. *Construction.*—In construing a judgment reference may be had to the pleadings and to the entire record. *May v. George*, 259, 261 (1).
2. *Motion in Arrest of Judgment.*—A motion in arrest of judgment must be filed before the judgment is rendered.

New Albany, etc., Mills Co. v. Senior, 453, 456 (4).

3. *Motion to Set Aside Default.—Affidavits.—Theory.*—One seeking to set aside a default, must proceed on some definite theory and must stand or fall on the facts stated in the affidavit upon which the motion is based, so that facts stated in subsequent affidavits which do not support the facts stated in the original affidavit cannot be considered.

Vapinski v. Tosetti, 547, 549 (3).

JUDGMENT—Continued.

4. *Default.—Setting Aside Default.—Sufficiency of Showing.*—An affidavit in support of a motion to set aside a judgment taken by default, showing that affiant desired to resist the action in which the judgment was taken, that he employed a competent attorney for that purpose, and that he believed such attorney would prepare his defense in due time, but that, without affiant's knowledge, such attorney failed to appear in the action, in consequence of which such judgment was taken, wholly fails to disclose such mistake, inadvertence, surprise or excusable neglect as to entitle defendant to relief under §405 Burns 1908, §396 R. S. 1881.

Vapinski v. Tosetti, 547, 548 (1).

5. *Default.—Excusable Neglect.—Negligence of Attorney.*—The negligence of an attorney is the negligence of the client, and a default suffered through the attorney's neglect will not be set aside, unless facts are stated showing such neglect to be excusable.

Vapinski v. Tosetti, 547, 549 (2).

6. *Motion to Vacate.—Sufficiency.*—Where, in a divorce proceeding, the court rendered judgment that neither party was entitled to a divorce and that each party pay his own costs, a motion to vacate the judgment on the ground that the court inadvertently rendered judgment without considering and passing upon the question of an allowance to plaintiff for her expenses including attorney fees in her defense to the cross-complaint, and to give her an opportunity to show the court that she is entitled to an allowance for such expenses, shows a good and sufficient cause for setting aside the judgment.

Foote v. Foote, 673, 676 (4).

7. *Vacating Judgments.—Power of Courts.*—Any proceeding in a court is *in fieri* until the close of the term, so that courts have complete control of the record of their proceedings during the entire term at which such proceedings are had, and, during such term may, for good cause shown, correct, modify or vacate any of their judgments.

Foote v. Foote, 673, 676 (2).

JUDICIAL NOTICE—

The court takes, of the rules governing the survey of public lands, see EVIDENCE 5.

JURAT—

Conclusiveness of notary's, see COUNTIES 3.

JURISDICTION—

Appellate, see APPEAL 1; CORPORATIONS 11.

Exercise of probate, see COURTS 2.

JURY—

Interrogatories to, see DAMAGES.

Misleading, see TRIAL 10.

Province of, see TRIAL 9, 11.

Province of court and, see TRIAL 1.

Right of, see TRIAL 13.

Issues of fact submission to, see RAILROADS 50.

Refusal to submit interrogatory to, when harmless, see APPEAL 121.

Where the evidence is of any probative force whatever, the weight to be given thereto, and the inferences to be drawn therefrom, are matters for the, see EVIDENCE 12.

"JUSTICES OF THE PEACE"—

See WORDS AND PHRASES.

Do not have jurisdiction of proceedings to identify a fugitive after he is in custody on the warrant of the Governor of this State, see EX-TRADITION 2.

Appeal.—Pleading.—The rules of pleading in actions before justices of the peace remain the same where appeals are taken to the circuit court. *Mount Carmel, etc., Turnpike Co. v. Loos*, 6, 9 (2).

KNOWLEDGE—

Master's, of danger, see MASTER AND SERVANT 43.

"LABORER"—

See WORDS AND PHRASES.

LANDS—

Bordering on lake, see BOUNDARIES 1, 2.

LAST CLEAR CHANCE—

See MASTER AND SERVANT 37, 38; RAILROADS 39, 40.

LAW OF THE CASE—

The prior decision of a cause on appeal becomes the, on a subsequent appeal only in so far as it is applicable to the facts presented on such subsequent appeal, see APPEAL 123.

LETTERS—

Annulment of, see EXECUTORS AND ADMINISTRATORS 2.

LIBEL AND SLANDER—

1. *Complaint.—Innuendo.*—A complaint for slander, where the words spoken are not slanderous *per se*, must show by innuendo, not only that the words were slanderously uttered, but were understood in the same slanderous sense by those in whose hearing they were spoken. *Floyd v. Fordyce*, 449, 450 (1).
2. *Evidence.—Sufficiency.*—In an action for slander, a verdict was properly directed for defendant, where the proof failed to establish any fact other than the speaking of certain words, not actionable *per se*. *Floyd v. Fordyce*, 449, 451 (2).
3. *Meaning of Words.—Jury Question.*—The meaning of one charged with slander, as averred by an innuendo, is a question of fact to be decided by the jury. *Floyd v. Fordyce*, 449, 451 (4).

LIENS—

See MECHANICS' LIENS.

Street improvement, see HUSBAND AND WIFE 6.

Tax, see HUSBAND AND WIFE 3.

LIFE ESTATE—

Payment of Taxes.—Duty of Tenant.—The taxes on real estate should be paid by the life tenant during the occupancy by such tenant, and failure to do so creates a lien in the first instance against his interest in the real estate. *Figgins v. Figgins*, 43, 46 (3).

LIMITATION OF ACTIONS—

See NUISANCE 2; TRUSTS 5.

LIVE STOCK—

Injury to, see RAILROADS 34-38.

LOOK AND LISTEN—

Duty to, see RAILROADS 1-5.

"LOT"—

See WORDS AND PHRASES.

MACHINERY—

Defective, see MASTER AND SERVANT 24.

Unguarded, see MASTER AND SERVANT 32, 33.

Unsafe, see MASTER AND SERVANT 30, 31.

MASTER AND SERVANT—

1. *Injuries to Servant.—Verdict.—Answers to Interrogatories.*—A verdict for plaintiff in a servant's action for personal injuries is not overcome by the jury's answer to an interrogatory that the injury was purely accidental, where other answers show that the injury was due to the negligence of defendant, and it appears from the answers as a whole that the jury did not mean that the injury was "purely accidental" in the sense that it occurred without the fault of any one. *Jenney Electric Mfg. Co. v. Flannery*, 397, 404 (6).
2. *Injuries to Servant.—Verdict.—Answers to Interrogatories.*—In an action by a minor employe for the loss of an eye through the use of muriatic acid in the course of his employment, answers to interrogatories showing that plaintiff, by the diligent use of his faculties, could have known of the danger, when considered with other answers showing that plaintiff had not learned the nature of the acid, nor the dangers attending its use, are not in irreconcilable conflict with a general verdict for plaintiff, which, under the issues, amounted to a finding that no warnings or instructions as to the dangerous character of such acid were ever given plaintiff. *Kingan & Co. v. Foster*, 511, 515 (5), 518 (5).
3. *Injury to Servant.—Answers to Interrogatories.*—Where the complaint alleged that plaintiff's decedent fell upon a floor negligently maintained in a slippery condition, whereby he came in contact with the binding posts of an electric motor negligently maintained in an uninsulated condition, and was killed, answers by the jury to interrogatories showing that the death was proximately due to the slippery floor, but not showing that such was the sole cause, are not in irreconcilable conflict with a verdict for plaintiff on the theory that decedent had assumed the risk incident to the defective condition of the floor. *Hammond v. Kingan & Co.*, 252, 258 (8).
4. *Injuries to Servant.—Assumption of Risk.—Care by Servant.*—Where the injury is the result of one of the risks assumed, the servant cannot recover, regardless of the care or want of care on the part of such servant in encountering the danger. *Jenney Electric Mfg. Co. v. Flannery*, 397, 406 (9).
5. *Injury to Servants.—Assumption of Risk.—Negligence of Fellow Servant.*—A servant assumes the risk of injury resulting from the negligence of a fellow servant, but where the negligence of a fellow

MASTER AND SERVANT—Continued.

servant coöperates with the negligence of the master in producing the injury the master is liable.

Hammond v. Kingan & Co., 252, 258 (7).

6. *Injuries to Servant.—Assumption of Risk.*—A servant assumes all the usual and ordinary risks incident to the employment, and also the risk of any known dangers that may arise during the course of such employment, even though not usually incident thereto, so that where the servant knows of a condition which renders the performance of his duties hazardous, and voluntarily encounters it he cannot recover for injuries thereby sustained, even though such danger was due to the master's negligence.

Jenney Electric Mfg. Co. v. Flannery, 397, 406 (8).

7. *Injury to Servant.—Instructions.—Assumption of Risk.*—In an action against an electric railway company by one who was employed to care for machinery in a car used by defendant as a temporary substation to recover for injuries from an electric shock caused by alleged defective wiring, an instruction which, when read in its entirety, limited the right to recover in such cases to those injuries resulting from the employer's failure or neglect to disclose hidden or latent and unseen defects or perils, the risk of which is not assumed by the employe, and which by implication informed the jury that it was not the master's duty to protect the servant against dangers reasonably and fairly incident to and within the ordinary risk of the services which he has undertaken, was not erroneous, although not entirely free from criticism.

Indiana Union Traction Co. v. Sullivan, 239, 245, (4).

8. *Injuries to Servant.—Complaint.—Sufficiency.—Scope of Employment.*—A complaint, in an action for the death of a servant, caused by a boiler explosion, alleging that the duties of decedent's employment required him to fire the boiler in question and that he was so engaged at the time of the explosion, is not open to the objection that it fails to disclose by direct allegations that decedent was acting in the line of his employment at the time he received the injury.

New Albany, etc., Mills Co. v. Senior, 453, 455 (1).

9. *Injury to Servant.—Complaint.—Evidence.*—In an action against an electric railway company for injuries caused by an electric shock to an employe in charge of machinery installed in a car which defendant was using as a temporary substation, where the complaint averred generally defendant's failure to use reasonable care to provide plaintiff a reasonably safe place to work, and also averred negligence in placing two insulated wires along the ceiling of the car and connecting with a switchboard at one end thereof and with high-tension wires at the other, it was not error to permit a witness for plaintiff to testify that the wires ought to have been brought into the car at the end thereof nearest to the transformers, since such evidence tended to prove a lack of reasonable care and was therefore within the issues.

Indiana Union Traction Co. v. Sullivan, 239, 243 (1).

10. *Injury to Servant.—Complaint.*—A complaint to recover for the death of an employe, alleging that defendant is a corporation engaged in manufacturing cars, that its plant is upon a large tract of land and consists of yards, buildings and other structures, about which defendant maintained railroad tracks of standard gauge over which it operated locomotive engines and cars and trains of cars in the transportation of lumber, iron, coal and other freight and in hauling cars constructed and in course of construction, and that said tracks connected with the tracks of a railroad company, sufficiently shows that §8017 Burns 1908, Acts 1893 p. 294, creating

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a liability against railroads for injuries to employes through the negligence of any employe in charge of a locomotive engine, train, etc., applies to that department of defendant's business in which the employes are exposed to the dangers incident to the operation of trains.
American Car, etc., Co. v. Inzer, 316, 321 (3).

11. *Injuries to Servant.—Safety Appliances.—Complaint.—“Dust.”*—A complaint charging defendant's failure to equip its emery wheel with an exhaust fan as required by the factory act (§8029 Burns 1908, Acts 1899 p. 231), and alleging that a large number of small and irregular particles, of which the wheel was composed, became dislodged therefrom in the form of dust and were projected in the form of dust violently from the wheel into the air, and that particles thus thrown off in the form of dust struck plaintiff's eye and produced the injury complained of, is not objectionable on the ground that it shows that the injury was not caused by dust, but by small particles of the wheel thrown off in its use, since if the particles were so small and fine that an exhaust fan would have carried them away and prevented the injury, they may properly be regarded as “dust” within the meaning of the statute.
Jenney Electric Mfg. Co. v. Flannery, 397, 402 (1).

12. *Injury to Servant.—Liability.—Statutes.—Complaint.*—A complaint for the death of a servant employed by a manufacturing corporation, which in one department of its business operated locomotive engines, cars and trains of cars upon a railroad track, alleging that decedent's death was caused by the negligence of another employe in the operation of a locomotive, sufficiently shows a liability under §8017 Burns 1908, Acts 1893 p. 294, creating a liability for injuries caused by the negligence of any person in charge of a locomotive engine, train, etc., without alleging that decedent was employed to assist in the operation of trains and that he was so engaged at the time of the injury.
American Car, etc., Co. v. Inzer, 316, 324 (5).

13. *Injuries to Servants.—Liability.*—A master cannot be held to respond in damages for injuries to his servant in the absence of a showing that the master violated a legal duty.
American Car, etc., Co. v. Fess, 136, 139 (3).

14. *Injury to Servant.—Liability.—Statutes.*—Section 8017 Burns 1908, Acts 1893 p. 294, creating a liability for injuries to railroad employes by the negligence of any person in charge of any locomotive engine, train, etc., in its application to a manufacturing company, which in one department of its business operates locomotives and cars on railroad tracks, is to be restricted to that department which has to do with the operation of trains and which exposes employes to the dangers incident to such operation.
American Car, etc., Co. v. Inzer, 316, 321 (2).

15. *Injury to Servants.—Liability.—Statutes.—Operation of Railroad.*—A company engaged in the manufacture of cars, which in one department of its business operates locomotives, cars, or trains of cars upon a railroad track, so that the dangers incident are substantially the same as the hazards of operating trains on a commercial railroad, is liable for an injury to its servant employed in such department, within the provisions of the fourth clause of §8017 Burns 1908, Acts 1893 p. 294, making railroad companies liable for injuries resulting to employes in their service through the negligence of any person in charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive engine or train, etc., since the classification contemplated by the statute is with reference to the character

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of the employment and it is immaterial whether the employer is an individual, firm, or a public or private corporation.

American Car, etc., Co. v. Inzer, 316, 319 (1), 321 (1).

16. *Injuries to Servant.—Contributory Negligence.—“Reasonable Care.”*—The question of whether an injured party was guilty of contributory negligence depends upon whether he was exercising reasonable care at and immediately prior to the injury, that is such care as persons of ordinary prudence would exercise under the conditions and circumstances of the particular case.

Jenney Electric Mfg. Co. v. Flannery, 397, 408 (10).

17. *Contributory Negligence.—Care Required.—Youthful Employes.*—A servant in the exercise of the ordinary care required of him to discover dangers of which the master should have warned him, and which are either latent or of such a character as to be unappreciated by him, because of inexperience or youth, is held to only the ordinary use of his faculties or senses. *Kingan & Co. v. Foster*, 511, 517 (9).

18. *Injuries to Servant.—Choice of Methods of Work.—Contributory Negligence.—Evidence.*—Where, in a servant's action for injuries, the evidence shows that the way adopted by plaintiff was one of the ways provided by the master, or at least a way recognized by him as a proper one, and there was evidence to justify the jury in finding that plaintiff was exercising ordinary care at the time of the injury, the verdict for plaintiff cannot be disturbed on the ground that plaintiff was guilty of contributory negligence in choosing a dangerous way when a safer way had been provided by the master.

Jenney Electric Mfg. Co. v. Flannery, 397, 412 (16).

19. *Injuries to Servant.—Choice of Methods of Work.—Right of Recovery.*—Where there are two ways of performing a service, one of which is safe and the other dangerous, or one of which is more dangerous than the other, and the servant is aware of such facts, he will not, as a general rule, be permitted to recover damages from the master for injuries resulting from his voluntary adoption of the dangerous or more dangerous way.

Jenney Electric Mfg. Co. v. Flannery, 397, 406 (7), 407 (7).

20. *Injuries to Servant.—Choice of Methods of Work.—Contributory Negligence.*—Contributory negligence cannot be imputed to a servant from the mere fact that he chooses the more dangerous way or method of performing a duty when a safer method was open to his choice, but is a question for the jury, except where the servant's choice exposed him to dangers so obvious that no reasonable man exercising ordinary care for his own safety would have encountered them, and there is no room for reasonable minds to differ upon the question.

Jenney Electric Mfg. Co. v. Flannery, 397, 408 (12).

21. *Injuries to Servant.—Violation of Statutory Duty.—Assumption of Risk.—Contributory Negligence.*—Although a servant's right to recover may be determined by the application of the doctrine of assumption of risk in cases where the danger created by the negligence of the master is one that can be assumed by the servant under his contract, where the negligence charged consists of the master's violation of a statutory duty, assumption of risk does not apply, and the question must be determined by the principles of law relating to contributory negligence.

Jenney Electric Mfg. Co. v. Flannery, 397, 410 (13).

22. *Injuries to Servant.—Choice of Methods of Work.—Contributory Negligence.—Answers to Interrogatories.*—In an action by a servant to recover for injury to his eye caused by emery dust lodging therein

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while plaintiff was sharpening a tool on the emery wheel, where the negligence charged was the master's failure to provide an exhaust fan to remove the dust, as provided by §8029 Burns 1908, Acts 1899 p. 231, and the jury's answers to interrogatories showed that defendant had supplied the emery wheel to plaintiff to be used in sharpening his tools, that it was suitable for the purpose and that the superintendent had directed plaintiff to use it, it cannot be said as a matter of law that plaintiff was guilty of contributory negligence in using such emery wheel instead of making use of a tool room provided by the master wherein tools could be sharpened with more safety. *Jenney Electric Mfg. Co. v. Flannery*, 397, 411 (14).

23. *Injuries to Servant.—Question for Jury.—Contributory Negligence.*—In an action for the death of a servant who fell from a ladder on which he was standing, while attempting to remove a defective shaft, onto an unguarded belt whereby he was carried and hurled to the floor and killed, where there was evidence showing a custom in defendant's factory not to stop machinery to make repairs unless absolutely necessary, and from which it might reasonably be inferred that such custom originated with the manager, and showing that the manager, knowing that decedent was about to attempt the work while the belts and pulleys below were in motion, did not forbid him to do so, and that it was a custom for defendant's servants to perform similar services while such belts and pulleys were in motion, the question of whether decedent was guilty of negligence contributing to his injury was for the jury.

Watt v. Mishawaka Paper, etc., Co., 682, 690 (6), 692 (6).

24. *Injuries to Servant.—Defective Machinery.—Evidence.—Admissibility.*—In an action for the death of an employe caused by the slipping of a derrick cable from the drum while a heavy girder was being placed, where it was charged that the cable was defectively attached to the drum and was too short for the proper handling of such girder, testimony of experts as to the proper manner of fastening cables to the drums of derricks, the method of safe operation, and as to the suitable length of a cable under the conditions shown, was properly admitted, since they were matters about which such witnesses had peculiar knowledge and as to which they were competent to testify.

Kelly-Atkinson Constr. Co. v. Munson, 619, 628 (10).

25. *Injuries to Servant.—Defective Appliances.—Evidence.—Sufficiency.*—In an action for the death of a servant by the slipping of a derrick cable from the drum while a heavy iron girder was being placed, evidence showing that the cable was defectively attached to the drum and was of insufficient length to properly handle such girder, and that such cable and its fastening to the drum had not been inspected during eighteen months previous to the injury, and also showing that while decedent had previously worked about such derrick, he had no knowledge of such defects, and that neither he nor the engineer, who operated the derrick engine pursuant to signals from the superintendent, had any opportunity to learn of such defects, was sufficient to sustain a verdict for plaintiff.

Kelly-Atkinson Constr. Co. v. Munson, 619, 624 (5).

26. *Injuries to Servant.—Defective Appliances.—Fellow Servants.—Instructions.*—In an action for the death of an employe by the slipping of a derrick cable from the drum, where there was evidence that the cable was of insufficient length and that it was defectively attached to the drum, an instruction stating that the persons who were at the time engaged in moving a girder by means of such derrick were fellow servants, and that defendant would not be liable if the

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injury was caused by their negligence, was properly refused because it ignored the element of the master's negligence with reference to the defective method in which the cable was attached to the drum. *Kelly-Atkinson Constr. Co. v. Munson*, 619, 628 (6).

27. *Injuries to Servant.—Negligence of Fellow Servant.*—Where plaintiff was working with another employe who was using a hand hammer, weighing about two and one-half pounds, which had been furnished by defendant about two weeks before the injury and had been in the control of the user during that time, the plaintiff's injury, caused by the hammer flying from the handle and striking him, must be attributed solely to the negligence of a fellow servant, under a showing that defendant maintained a tool room, with men in charge whose business it was to repair tools which were returned as defective, and to which all employes were instructed to return all defective tools, and in the absence of evidence to show that the hammer was defective when delivered to the user, or that defendant had any knowledge that it had become defective.

American Car, etc., Co. v. Fess, 136, 139 (2).

28. *Injuries to Servant.—Negligence of Fellow Servant.—Evidence.*—In an action for the death of an employe engaged in track elevation work, by the slipping of a derrick cable from the drum while a heavy girder was being placed, evidence which, though showing that decedent and the engineer who operated the derrick engine had previously worked with such derrick, also shows that they had no knowledge of the defective method in which the cable was attached to the drum and had no opportunity of learning that it was defectively attached or that it was of insufficient length to properly handle such girder, affords no support to defendant's theory that the engineer, who was operating pursuant to signals from the superintendent, was, in operating the engine when the cable had been unwound from the drum, guilty of the negligence which caused the death.

Kelly-Atkinson Constr. Co. v. Munson, 619, 624 (4).

29. *Injuries to Servant.—Tools.—Duty of Inspection.*—The master does not owe the duty of inspecting a hand tool while it is in the exclusive control and custody of his servant, where such tool is so simply constructed that a defect therein may be discovered without special skill or knowledge and without intricate inspection, nor is he chargeable with notice of any defect that could have been discovered had he made an inspection.

American Car, etc., Co. v. Fess, 136, 138 (1).

30. *Injuries to Servant.—Unsafe Machinery.—Negligence of Fellow Servant.—Complaint.*—A complaint in an action for personal injuries to an employe is not insufficient on the theory that the injury was caused by the negligence of a fellow servant, where it appears from its averments that the injury was caused by the combined negligence of the master in supplying unsafe machinery and of a fellow servant in the operation of the same, since the master is relieved from liability only when he has exercised reasonable care and prudence in supplying safe machinery and the injury occurs solely through the negligence of the fellow servant.

Kelly-Atkinson Constr. Co. v. Munson, 619, 623 (2).

31. *Injuries to Servant.—Unsafe Machinery.—Complaint.—Sufficiency.*—A complaint to recover for the death of one employed in elevating a railroad track, by the slipping of a derrick cable from the drum while a heavy girder was being put in place, alleging that the cable was not safely and properly attached to the drum and was not of sufficient length to safely perform the work for which it was used, of which defendant had knowledge and of which plaintiff was ignorant,

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and that defendant's superintendent ordered the starting of the engine when the cable was unwound from the drum, charged actionable negligence on the part of defendant and was sufficient to withstand a demurrer. *Kelly-Atkinson Constr. Co. v. Munson*, 619, 624 (3).

32. *Injuries to Servant.—“Laborer.”—Unguarded Machinery.*—Under evidence showing that decedent, although having a certain control over the laborers in defendant's mill, was hired as a millwright and general utility man, that he looked after the machinery and made necessary repairs, subject to the directions of defendant's secretary, treasurer and manager, and that it was his business to make the particular repair he was attempting at the time of his injury and death, decedent was a “laborer” within the meaning and intent of §8029 Burns 1908, Acts 1899 p. 231, §9, relating to the guarding of machinery.

Watt v. Mishawaka Paper, etc., Co., 682, 687 (3).

33. *Injuries to Servant.—Unguarded Machinery.—Belts.*—In an action for the death of a servant, evidence showing that he fell upon an unguarded belt and was thereby carried and hurled to the floor and killed, that employes of defendant in performing their work were frequently required to be about the unguarded belts and pulleys, that such belt could have been guarded so as to protect employes required to work above same, and without affecting its efficiency, that it was customary for decedent and others to work above such belt in oiling machinery, and that such belt was dangerous, should have gone to the jury as tending to show negligence on the part of defendant in failing to properly guard such belt in compliance with §8029 Burns 1908, Acts 1899 p. 231, §9.

Watt v. Mishawaka Paper, etc., Co., 682, 688 (4).

34. *Injuries to Servant.—Evidence.—Admissibility.*—In an action for personal injuries by a servant whose eye was injured by a flying particle of emery from an emery wheel on which he was sharpening a drill, there was no error in the admission of testimony to prove that it was customary for the employes to sharpen their drills and other tools on the emery wheel at which plaintiff was working when he received the injury.

Jenney Electric Mfg. Co. v. Flannery, 397, 417 (22).

35. *Injuries to Servant.—Verdict.—Evidence.*—In an action for the death of a servant in a boiler explosion, where, in addition to evidence establishing the fact of the explosion, the testimony of experts who examined the boiler after the explosion showed that where the rent in the boiler occurred the shell was much thinner than the remaining portion, that such thin place had probably existed for three to six months prior to the explosion, and that the same could have been discovered by a proper hammer test, the verdict for plaintiff cannot be disturbed on the ground that the evidence is insufficient to show either that the boiler was defective or that defendant knew or could have known of such defects.

New Albany, etc., Mills Co. v. Senior, 453, 457 (5).

36. *Injuries to Servant.—Evidence.—Sufficiency.*—In a servant's action for injuries to his eye caused by emery dust lodging therein while plaintiff was sharpening a tool on an emery wheel, where the complaint proceeded on the theory that plaintiff was employed as a machinist and that it was a part of his duties under such employment to keep his tools sharp by grinding them on the emery wheel which defendant had provided for that purpose, evidence showing that a part of plaintiff's work was to sharpen the drills with which he worked and that he usually sharpened all his tools on such emery wheel, that the superintendent often saw him grinding tools on such

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wheel, and on one occasion had specially directed plaintiff to grind a drill thereon, is sufficient to show that plaintiff was acting within the scope of his employment at the time he received his injury.

Jenney Electric Mfg. Co. v. Flannery, 397, 411 (15).

37. *Injury to Servant.—Liability.—Last Clear Chance.*—Where an employe was engaged in tinning the roof of a car coupled to other cars, and through his own negligence fell from the car onto the track when a locomotive was coupled thereto, and while lying helpless upon the track was killed by the negligence of those in charge of the train in backing the engine over him, the company was liable for his death under the doctrine of last clear chance.

American Car, etc., Co. v. Inzer, 316, 324 (6).

38. *Injury to Servant.—Last Clear Chance.—Statutes.*—The last clear chance doctrine is applicable to the case of an employe thrown from a car through his own negligence and killed by the negligence of those in charge of the train in backing it over him, notwithstanding §8017 Burns 1908, Acts 1893 p. 294, creating a liability against railroad companies for injuries to employes through the negligence of any other employes in charge of any locomotive engine, train, etc., provides that the injured employe must have been in the exercise of due care and diligence, since such provision is but a restatement of the common law rule that contributory negligence will preclude recovery, and the doctrine of last clear chance, while not an exception to such rule, is based upon the theory that the plaintiff's negligence does not contribute directly to the injury, but that such injury was proximately caused by the intervening negligence of defendant.

American Car, etc., Co. v. Inzer, 316, 324 (7).

39. *Injuries to Servant.—Proximate Cause.—Question for Jury.—Evidence.*—In an action for the death of a servant in falling from a ladder on which he was working onto an unguarded belt, whereby he was carried and hurled to the floor and killed, where there was evidence tending to show that the belt could have been so guarded as to prevent him from falling thereon, and if such a guard had been present he would not have been hurt by the fall, the question of whether the slipping of the ladder, or the unguarded belt, or both, was the proximate cause of the death, should have been submitted to the jury under proper instructions.

Watt v. Mishawaka Paper, etc., Co., 682, 689 (5).

40. *Injury to Servant.—Proximate Cause.—Assumption of Risk.*—Although the jury's answers to interrogatories show that plaintiff's decedent, whose death is alleged to have been caused by slipping on a greasy floor and thereby coming in contact with a defectively insulated electrical appliance, knew of the dangerous condition of the floor and had assumed the risk of all injuries of which such condition was the sole proximate cause, a recovery is not thereby barred, since if his death resulted proximately from another cause for which defendant's negligence was responsible, he cannot be deemed to have assumed the risk of injury from that source in the absence of knowledge of the danger to which such negligence exposed him.

Hammond v. Kingan & Co., 252, 255 (4), 257 (4).

41. *Injuries to Servant.—Proximate Cause.—Evidence.—Sufficiency.*—In an action by a servant for injury to his eye occasioned by a particle of emery dust lodging therein, evidence showing that the emery wheel had not been equipped with an exhaust fan, that an exhaust fan would not carry away all particles of emery rebounding from the wheel, but that it would do so to some extent, and that plaintiff's injury was caused by a minute particle of emery, was sufficient to warrant the jury in concluding that the failure to provide the ex-

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haust fan was the proximate cause of the injury, although it was not expressly shown that the particle causing the injury was one that would have been removed by an exhaust fan had one been provided.

Jenney Electric Mfg. Co. v. Flannery, 397, 413 (17).

42. *Injury to Servant.—Proximate Cause.*—Where the complaint in an action for death of a servant charged defendant with negligence in permitting the floor where decedent was required to work to become slippery, and in installing and operating a motor with uninsulated binding posts in close proximity to decedent's working place, and alleged that decedent's death was caused by a current of electricity communicated to his body from such binding posts, with which he came in contact by falling and that the fall was caused by the slippery condition of the floor, a verdict for plaintiff is a finding that the two conditions of decedent's working place existed as alleged and were due to defendant's negligence, and that such conditions were the combined proximate cause of the death.

Hammond v. Kingan & Co., 252, 256 (5), 258 (5).

43. *Injuries to Servant.—Master's Knowledge of Danger.—Presumptions.*—The master in charge of a factory is presumed to know the dangers, latent as well as obvious, arising from the performance of duties imposed upon employes.

Kingan & Co. v. Foster, 511, 516 (6).

44. *Injuries to Servant.—Care to Avoid Injury.—“Diligent.”—“Diligent Use of Faculties.”*—An interrogatory to the jury asking if plaintiff, by “the diligent use of his faculties,” could have discovered the dangerous character of acid used in connection with his employment, is based upon a higher degree of care than that which the law requires in enjoining the ordinary and reasonable exercise of one's senses, since “diligent” is defined to mean attentive and persistent in doing a thing, steadily applied, active, sedulous, laborious, unremitting, untiring, etc.

Kingan & Co. v. Foster, 511, 516 (7).

45. *Injuries to Servant.—Vice Principals.—Instructions.*—In an action for the death of a servant, where there was evidence to show that a part of the duties devolving on the foreman required him to furnish defendant's employes with reasonably safe tools and a reasonably safe place in which to work, a requested instruction as to the negligence of fellow servants which would indicate to the jury that, although such foreman was negligent in performing a duty owing by the master and such negligence assisted in producing the injury, defendant would not be liable, was properly refused.

Kelly-Atkinson Constr. Co. v. Munson, 619, 626 (7).

46. *Injury to Servant.—Instructions.—Assuming Facts.*—In an action by the custodian of a car, used by defendant as a temporary substation for its electric railway, for injuries received from an electric shock alleged to have been caused by defective wiring, an instruction which in effect told the jury that if it finds that there was a safe way in which defendant, without any great additional expense or interference with its business, could have connected its high tension wires with its transformers, it was its duty to choose such safe way rather than the unsafe one, was erroneous in that it assumed that the way in which the wiring had been done was dangerous and that the same had been negligently done.

Indiana Union Traction Co. v. Sullivan, 239, 248 (7), 250 (7).

47. *Injury to Servant.—Instructions.—Safe Place to Work.*—While the statement in an instruction that “the defendant is required to furnish its employes with a suitable and ordinarily safe place in which to perform their duties” is not technically correct and is open to criticism, the defect was harmless, since, when considered in the

MASTER AND SERVANT—Continued.

light of the other instructions, the jury must have understood therefrom that the place of work must be ordinarily safe when considered with reference to the character of the work required.

Indiana Union Traction Co. v. Sullivan, 239, 247 (5).

48. *Safe Place to Work.—Care Required.*—In furnishing the employe a place to work, the master must use that degree of care and caution which ordinary prudence would dictate, taking into account the dangers and hazards of the service required and the usual and known methods of avoiding the same.

Indiana Union Traction Co. v. Sullivan, 239, 247 (6).

49. *Safety Appliances.—Exhaust Fans.—Statutes.*—The purpose of the statute (§8029 Burns 1908, Acts 1899 p. 231), requiring exhaust fans on emery wheels is to reduce the hazard incident to the operation of such wheels. *Jenney Electric Mfg. Co. v. Flannery*, 397, 402 (2).

50. *Warning Employes.—Duty.*—An employer is generally bound to warn and instruct his employes concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are not discoverable by them in the exercise of ordinary and reasonable care.

Kingan & Co. v. Foster, 511, 514 (3).

51. *Warning Employes.—Youthful Employes.*—The master is bound to give suitable warning and instruction to a minor employe in regard to any danger, whether open or concealed, where such danger is not sufficiently obvious to the intelligence or experience of such employe, in the exercise of ordinary care on his part, measured by the maturity of his faculties and the amount of his experience.

Kingan & Co. v. Foster, 511, 515 (4).

MISCONDUCT—

Of counsel, see APPEAL 120.

Of counsel, is not available for reversal, where the court withdrew the remarks from the jury and instructed it not to consider them, see APPEAL 9.

MECHANICS' LIENS—

1. *Creation of Lien.—Statutes.*—Both the title and the text of the act of 1909 (Acts 1909 p. 295), are amply sufficient to give a lien to contractors and subcontractors who comply with the provisions of the act.

Rooker v. Ludowici Celadon Co., 275, 279 (6).

2. *Notice.—Defective Description.—Amendment.*—A defective description in a notice of mechanics' lien may be so amended as to make it good if the notice contains any reference, which, aided by extrinsic evidence, may correct the description.

Hillyard v. Robbins, 107, 111 (3).

3. *Extent of Lien.—Separate Buildings.—Special Findings.*—Under Acts 1909 p. 295, §§1, 2, providing that a lien shall extend to the interest of the owner of the lot or parcel of land on which the structure stands or with which it is connected, and that the entire land upon which any such building, etc., is situated, including that portion not covered therewith, shall be subject to lien, a declaration of a lien on the entire parcel of real estate was authorized on a special finding of facts showing the existence of three separate buildings on a designated lot and that the labor and material were furnished directly to defendants and all put into a building or buildings standing on such lot, and in the absence of any issues and supporting evidence that would require a restriction of the lien to a certain subdivision of the lot. (*Hill v. Ryan* [1876], 54 Ind. 118; *Hill v. Braden* [1876],

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54 Ind. 72; *Wilkerson v. Rush* [1877], 57 Ind. 172; and *McGrew v. McCarty* [1881], 78 Ind. 496, distinguished.)

Judah v. F. H. Cheyne Electric Co., 476, 486 (12).

4. *Foreclosure.—Complaint.—Sufficiency.*—A complaint for the foreclosure of a mechanic's lien for labor and material furnished "in the repair and construction of certain electrical work and electric wiring in and upon" a certain building, is not open to the objection that it fails to show affirmatively that such labor and material were furnished for the "erection, alteration, repair, or removal," of the building. *Judah v. F. H. Cheyne Electric Co.*, 476, 481 (4).

5. *Foreclosure.—Complaint.—Requirements.*—Under the mechanics' lien statute (Acts 1909 p. 295, §§1, 2), the complaint in an action to foreclose must show by its averments that the materials and labor for which a recovery is sought were furnished for the particular building against which the lien is asserted, and is insufficient if it merely shows that they were used in such building.

Judah v. F. H. Cheyne Electric Co., 476, 479 (1).

6. *Foreclosure.—Complaint.—Sufficiency.*—A complaint for the foreclosure of a mechanic's lien, averring that defendants are indebted to plaintiff for labor and material furnished by plaintiff at the special instance and request of defendants in the repair and construction of certain work upon a certain described building, sufficiently shows that the labor and materials were specially furnished for the particular building against which the lien is asserted.

Judah v. F. H. Cheyne Electric Co., 476, 480 (2).

7. *Foreclosure.—Parties.—Complaint.*—In an action to foreclose a mechanic's lien for labor in the erection of a dwelling house, one who had a contract with the owner for the purchase of the property, and under whose direction the house was built, was a proper party defendant, and a complaint which was sufficient to make him a party to answer to his interest will be held sufficient as against initial attack on appeal to sustain a decree of foreclosure against him.

Hillyard v. Robbins, 107, 111 (5).

8. *Foreclosure.—Complaint.—Initial Attack on Appeal.—Special Findings.*—Where, in an action to foreclose a mechanic's lien, there was a special finding of facts by the trial court, objections urged to the sufficiency of the complaint on the ground that it contained no bill of particulars, that the exhibit of the complaint was not properly identified, and that there is a variance between the description of the real estate in the notice and the complaint, were cured by such finding as against attack made for the first time on appeal.

Rooker v. Ludowici Celadon Co., 275, 278 (4).

9. *Foreclosure.—Complaint.—Sufficiency.*—A complaint for the foreclosure of a mechanic's lien, alleging that defendants are indebted to plaintiff in a certain sum for labor performed and material furnished at defendant's special instance and request in the erection of a certain dwelling house upon certain described real estate, that such material was furnished and the labor performed within sixty days next preceding the filing of notice of intention to hold a mechanic's lien, etc., and making a copy of the notice a part thereof, was sufficient as against attack made for the first time on appeal.

Rooker v. Ludowici Celadon Co., 275, 278 (2).

10. *Foreclosure.—Complaint.—Amendment.*—Under §§400-403 Burns 1908, §§391-394 R. S. 1881, providing for the amendment of pleadings, the trial court has wide discretion in so doing, and since §8297 Burns 1908, Acts 1889 p. 257, relating to the filing of notice of an intention to hold a mechanic's lien, provides that the description of the lot or land in such notice shall be sufficient if from such description,

MECHANICS' LIENS—Continued.

or any reference therein, the lot or land can be identified, the action of the trial court, in an action to foreclose a mechanic's lien on land described in the notice as lot 31, permitting the amendment of the complaint to show lot 32 instead, was not erroneous, in the absence of a showing that defendants were thereby in any way surprised, prejudiced or deprived of any right. *Hillyard v. Robbins*, 107, 110 (2).

11. *Foreclosure.—Findings.—Sufficiency.*—In an action for the foreclosure of a mechanic's lien, a special finding that pursuant to contract the plaintiff furnished the labor and material, "that defendants accepted said repairs," etc., and that a certain sum "remains due and unpaid at the time of the commencement of this action from the defendants herein to the plaintiff on account of the sale, furnishing and installation of the aforesaid wiring and electrical material in said building," is not objectionable on the ground that it fails to state that any work or material was furnished for any building or that any building was repaired.

Judah v. F. H. Cheyne Electric Co., 476, 485 (10).

12. *Foreclosure.—Findings.—Ownership of Property.*—In an action to foreclose a mechanic's lien, where the only inference that could be drawn from the finding of facts as a whole, was that defendants, as trustees and devisees, became the owners of the real estate and continued as such and rented such real estate and contracted with plaintiff for the improvements thereon, received and accepted such improvement as such owners, and offered and tendered payment of the amount they claimed to be due thereon, and litigated the difference between the amount of the tender and the amount sought to be recovered by plaintiff, the judgment for plaintiff will not be reversed because the court did not in express words find the ultimate fact of present ownership of the real estate in question.

Judah v. F. H. Cheyne Electric Co., 476, 484 (9).

13. *Foreclosure.—Ownership of Property.*—In an action to foreclose a mechanic's lien, defendant's ownership of property against which the lien is asserted must be established.

Judah v. F. H. Cheyne Electric Co., 476, 483 (5).

14. *Waiver.—Evidence.*—An extension of the time of payment beyond the time within which a lien may be enforced clearly shows an intention to waive the lien.

Masson v. Indiana Lighting, etc., Co., 376, 380 (7).

15. *Waiver.—Evidence.*—The extension of the time for payment of a claim, for which a lien may be had, beyond the period for acquiring such lien, is a circumstance that may be considered on the subject of waiver, but is not conclusive.

Masson v. Indiana Lighting, etc., Co., 376, 380 (6).

16. *Waiver.*—A person may by express contract waive his right to hold and enforce a mechanic's lien, and such waiver may be inferred or implied from a course of dealing or acts evidencing a clear intention so to do. *Masson v. Indiana Lighting, etc., Co.*, 376, 380 (5).

MODIFICATION—

Failure to ask, see APPEAL 129.

MONUMENTS—

Set by the government surveyor to establish section points control if existing, see BOUNDARIES 3.

MORTGAGES—

See DESCENT AND DISTRIBUTION 3.

1. *Foreclosure.—Rights of Wife of Mortgagor.*—As against a mortgage in which the wife has joined, she may compel the holder to exhaust the husband's two-thirds before selling her one-third to pay the mortgage debt, and she is entitled to the surplus not exceeding one-third of the value of the whole of the land as against her husband's creditors, and the same rule applies in favor of a widow as to a purchase money mortgage in which she had not joined, where her husband conveyed the real estate encumbered by such mortgage.
Darby v. Vinnedge, 525, 532 (2).
2. *Judgment Lien.—Subrogation.*—One's claim to subrogation under a mortgage, for the payment of which he furnished the money, taking to himself a new mortgage, is not justified by the fact that the holder of a judgment lien junior to such original mortgage is not harmed thereby.
Nelson v. McKee, 344, 354 (5).
3. *Judgment Lien.*—One furnishing money for the payment of another's mortgage, and taking to himself a mortgage as security for the money advanced, is charged with knowledge that judgment and other liens may have attached after the execution of the original mortgage, and which, upon its satisfaction, will become prior liens to his mortgage.
Nelson v. McKee, 344, 354 (6).

MUNICIPAL CORPORATIONS—

1. *Public Improvements.—Contractor's Bond.—Discharge of Surety.*—A surety on the bond of a municipal contractor for the construction of a public improvement is not discharged on the approval of the final assessment roll, and an action on the bond may thereafter be maintained against such surety.
American Fidelity Co. v. East Ohio, etc., Co., 335, 343 (4).
2. *Public Improvements.—Contractor's Bond.—Discharge of Surety.*—The surety on the bond of a municipal contractor for the construction of a public improvement is not discharged by the failure of the city to require evidence of the payment of all bills before accepting the work and approving the assessment roll, as contemplated by the specifications and by the contract and bond.
American Fidelity Co. v. East Ohio, etc., Co., 335, 343 (5).
3. *Public Improvements.—Contractor's Bond.—Rights of Surety.—Subrogation.—Diligence.*—A surety on the bond of a municipal contractor for the construction of a public sewer, who failed to assert its rights to be subrogated to the money in the hands of the city until long after it had been assigned, and material men had brought an action against the surety, is barred by its laches from asserting a right to be subrogated to such money, since subrogation is founded in equity, and before equity may be invoked for purposes of subrogation, diligence must be shown.
American Fidelity Co. v. East Ohio, etc., Co., 335, 341 (3).
4. *Public Improvements.—Remedy of Property Owners.*—Under §8959 Burns 1908, Acts 1905 p. 219, §265, the right of injunction and appeal, as given by the statute itself, are the only remedies open to property owners who are aggrieved by the action of a city or town board in the matter of public improvements.
Anheier v. Fowler, 535, 546 (2).
5. *Public Improvements.—Remedy of Property Owner.—Time of Suing.—Complaint.*—An action by property owners to set aside and cancel as void a contract for the construction of a sewer, is governed by §8959 Burns 1908, Acts 1905 p. 219, §265, providing that no suit to enjoin the construction of any improvement shall be brought unless

MUNICIPAL CORPORATIONS—Continued.

brought within ten days from the letting of the contract, so that a complaint disclosing that plaintiffs did not bring themselves within the provisions of the statute is fatally defective.

Anheier v. Fowler, 535, 543 (1).

6. *Public Improvements.—Streets.—Assessments Against Abutting Property.—Statutes.*—Neither the provisions of the cities and towns act of 1905 (Acts 1905 p. 219, §§107, 108, 265) relating to the improvement of streets and the assessment of the cost against abutting property, nor of the act of 1909 (Acts 1909 p. 412) amending said sections in certain particulars, authorize the assessment of abutting property for the improvement of a street by grading only, but clearly contemplate grading and paving with some kind of modern paving material, so that by the one proceeding and assessment there shall be a complete and finished improvement.

Town of Jasper v. Cassidy, 678, 680 (2).

7. *Street Improvements.—Taxation.*—Street improvement statutes are considered an exercise of the power of taxation.

Darby v. Vinnedge, 525, 533 (5).

8. *Use of Streets.*—It is within the discretion of the municipality to determine what part of the nominal highway shall be devoted to the various purposes of passage.

Delaware, etc., Tel. Co. v. Fleming, 555, 564 (7).

NAMES—

Idem Sonans.—Names Within Rule.—Courts look to the sound of names rather than to their spelling, and the names "Valentine Schuetz" and "Falladine Schutz" are *idem sonans*, so that it will be presumed that "Valentine Schuetz," whose land was divided in a partition proceeding, was "Falladine Schutz" to whom the land had been deeded.

Knickerbocker Ice Co. v. Surprise, 286, 295 (6).

NATIONAL BANKS—

The capital stock of, invested in government bonds is not subject to taxation as against the bank, see TAXATION 2.

NATURALIZATION—

Fees for, see ALIENS 1-3.

NEGLIGENCE—

See FRAUD 8; PLEADING 9; TELEGRAPHS AND TELEPHONES 6, 7.

Liability for, see CEMETERIES.

Of the attorney is the, of the client, see JUDGMENT 5.

Of fellow servant, see MASTER AND SERVANT 5, 27, 28, 30.

Of driver of vehicle, see RAILROADS 8, 9, 13, 14, 22, 24, 25, 28-30, 32, 41.

1. *Burden of Proof.—Presumptions.*—The plaintiff in an action for personal injuries has the burden of proving a breach of duty on the part of the defendant, but there is no presumption that a defendant has discharged the duties imposed by law.

New Albany, etc., Mills Co. v. Senior, 453, 458 (9).

2. *Condition of Premises.—Obligation of Owner.*—A cemetery association owes no duty to a mere licensee upon its premises, except that of protecting him against active negligence.

East Hill Cemetery Co. v. Thompson, 417, 422 (4).

NEGLIGENCE—Continued.

3. *Condition of Premises.—Obligation of Owner.*—A cemetery association operated as a business organization, although not for profit, owes a duty to one who is upon its premises by invitation arising out of a common interest or mutual advantage, and a failure to perform such duty is actionable negligence.
East Hill Cemetery Co. v. Thompson, 417, 422 (3).
4. *Dangerous Condition of Premises.—Trespassers.—Licensees.*—A cemetery is not a public park, conducted and maintained for relaxation and enjoyment, and one, who is not a lot-owner and has no relatives buried therein, who enters therein through an open gate, for no purpose involving mutuality with the business or object of the cemetery association, but purely for inspection of the premises and for pleasure, while not a trespasser, is a mere licensee and therefore not entitled to recover for injuries due to the defective condition of the premises, even though his entry is pursuant to a rule of the association providing that the gates shall be open to visitors at reasonable hours. *East Hill Cemetery Co. v. Thompson*, 417, 427 (6).
5. *Legal Status of Injured Person.—Complaint.*—The legal status of a person at the time of his injury or death through the negligence of another is not to be determined by its characterization in the complaint, but from all the facts averred.
Pittsburgh, etc., R. Co. v. Foust, 90, 96 (4).
6. *Complaint.—Sufficiency.*—A complaint showing that defendant owed the plaintiff a duty and containing a general charge of the negligent failure to discharge that duty, which resulted in the injury complained of, is sufficient to withstand a demurrer.
Kinmore v. Cresse, 693, 695 (2).
7. *Elements of Action.—Complaint.*—Where the breach by defendant of a legal duty owing by him to the plaintiff, and an injury to plaintiff resulting from such breach, is shown, actionable negligence exists, but the absence of either of the three elements will render the complaint bad.
Pittsburgh, etc., R. Co. v. Foust, 90, 94 (1).
8. *Complaint.—Sufficiency.—Trespassers.—Licensees.*—A complaint against a cemetery association for injuries on a defective bridge in the cemetery, charging that the injury was the result of the defendant's negligence, and that plaintiff was lawfully upon the grounds of defendant by and with the consent and invitation of defendant, sufficiently shows that plaintiff at the time of his injury was not a trespasser or a licensee.
East Hill Cemetery Co. v. Thompson, 417, 420 (1).
9. *Complaint.—Ruling on Motion to Make Specific.*—In an action for injuries to plaintiff by the defendant's automobile, where the complaint specifically stated the position of the parties, what was done by each and the result, and charged that the automobile was in the possession and control of defendant and was by him negligently run against plaintiff "in a manner unknown to her", the overruling of a motion to make the complaint more specific was not erroneous, since it is evident from the averments that the details called for relate to matters about which defendant must have had better knowledge than the pleader.
Kinmore v. Cresse, 693, 697 (4).
10. *Contributory Negligence.—Complaint.*—Contributory negligence, being a defense, need not be negated in the complaint.
Wabash R. Co. v. McNown, 116, 135 (20).
11. *Contributory Negligence.*—One can be said to be guilty of contributory negligence only where he has failed to use ordinary or reasonable care to avoid injury.
Kingan & Co. v. Foster, 511, 517 (8).

NEGLIGENCE—Continued.

12. *Contributory Negligence.—Answers to Interrogatories.*—It is only where the facts found by the jury lead to but one inference, that the court will say as a matter of law that the injured party was guilty of contributory negligence.

Wabash R. Co. v. McNown, 116, 129 (10).

13. *Contributory Negligence.—Instructions.*—Where instructions are given stating that plaintiff is entitled to recover on proof of the allegations of the complaint, they may be cured by other instructions which fully cover the defense of contributory negligence.

Home Tel. Co. v. Weir, 468, 469 (1).

14. *Contributory Negligence.—Aggravation of Injuries.—Damages.*—Subsequent negligence of an injured party which tends to aggravate the injury, although to be considered as affecting the measure of damages, does not bar a recovery of such damages as were occasioned by the original injury.

Jenney Electric Mfg. Co. v. Flannery, 397, 416 (19).

15. *Injury to Property.—Contributory Negligence.—Complaint.—Burden of Proof.*—In an action for damages for injury to personal property, the plaintiff must allege and prove that he was free from any negligence contributing to such injury.

Delaware, etc., Tel. Co. v. Fleming, 555, 559 (2).

16. *Injury to Property.—Contributory Negligence.—Complaint.—Sufficiency.*—A complaint for injury to plaintiff's horse, alleging that plaintiff was exercising reasonable and ordinary care in its management and control, and that he was at all times free of negligence or fault that in any way contributed to the injury of said horse, sufficiently avers plaintiff's freedom from contributory negligence, in the absence of specific averments negating the effect of such general allegation. *Delaware, etc., Tel. Co. v. Fleming*, 555, 559 (3).

17. *Injuries to Travelers on Highway.—Complaint.—Allegations.—Contributory Negligence.*—A complaint in a negligence case alleging that plaintiff was traveling in a buggy driven by her uncle upon a public highway, that she saw defendant approaching behind them in an automobile, and that when the machine was about 300 or 400 feet distant plaintiff requested her uncle to stop the horse so she could get out, and while getting out she signalled defendant to stop the automobile, which was then about 200 feet away and running slowly, and that plaintiff had crossed the highway and was standing on the other side off the traveled part, when defendant negligently ran the automobile against her, is not open to the objection that it leaves an inference of contributory negligence on plaintiff's part.

Kinmore v. Cresse, 693, 695 (1).

18. *Injury While on Premises of Another.—Implied Invitation.*—Where an implied invitation is relied upon in an action for personal injuries sustained while on the premises of another, plaintiff must show that his entry on the premises was for a purpose connected with the business of the occupant, or which is carried on there, and must show some mutuality of interest in the object of his business, although the particular object may not be for the benefit of the occupant.

East Hill Cemetery Co. v. Thompson, 417, 426 (5).

19. *Intervening Negligence.*—The concurring negligence of a third person is not sufficient, alone, to relieve from liability one whose negligence was the proximate cause of the injury.

Wabash R. Co. v. McNown, 116, 132 (13).

- 19a. *Joint Negligence.*—Where two or more joint tortfeasors are guilty of negligence proximately contributing to an injury, either or all

NEGLIGENCE—Continued.

of such joint tort feasons may be required to respond in damages therefor, if the other elements of liability are shown.

Wabash R. Co. v. McNown, 116, 132 (15).

20. *Proximate Cause.—Jury Question.*—The question of proximate cause, whether it relates to the negligence of plaintiff or to that of defendant, is primarily a question of fact for the jury.

Henry v. Epstein, 265, 275 (8).

21. *Proximate Cause.—Concurring Causes.—Liability.*—Where two causes combine and proximately concur in producing an injury, the party at fault for one of such causes will be held liable, provided the injury would not have occurred in the absence of such fault.

Hammond v. Kingan & Co., 252, 257 (6).

22. *Proximate Cause.—Complaint.*—A complaint against a telephone company on the theory of negligence in the maintenance of a certain guy wire, extending from one of defendant's poles to an anchor in the ground at a point immediately within the curb line of a certain street and alleging that plaintiff's horse, which became frightened and unmanageable by reason of escaping steam on the opposite side of the highway, ran and jumped across said wire and became entangled therewith and was thereby injured, is not objectionable on the theory that it shows that the escape of the steam was an independent proximate cause of the injury, and that the presence of the wire was only a condition and not the proximate cause.

Delaware, etc., Tel. Co. v. Fleming, 555, 559 (1).

23. *Trial.—Question for Jury.*—Ordinarily negligence is a question of fact for the jury to determine, and it is only when the standard of duty is fixed and certain, or where the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law.

Neely v. Louisville, etc., Traction Co., 659, 666 (5).

24. *Reasonable Care.—Question for Jury.*—Reasonable care is such care as a reasonably prudent person would use under the circumstances of the particular case, and whether under given circumstances and conditions a person used reasonable care, or was guilty of contributory negligence, is generally for the jury under proper instructions.

Watt v. Mishawaka Paper, etc., Co., 682, 691 (7).

25. *Reasonable Care.—Jury Question.*—The question of reasonable care is usually one of fact for the jury since it is only in cases where the facts are undisputed and are such that but a single inference may reasonably be drawn therefrom, that the court can determine as a matter of law that reasonable care was or was not exercised.

Jenney Electric Mfg. Co. v. Flannery, 397, 408 (11).

26. *Jury Question.*—The question of negligence is ordinarily one of fact for the jury, but the court may, where the facts admit of no other inference, tell the jury that if it finds that such facts were proved, negligence may be inferred therefrom.

Indiana Union Traction Co. v. Sullivan, 239, 250 (8).

27. *Jury Question.*—Ordinarily negligence is a question of fact, but where the facts are undisputed and admit of but one inference, the question is one of law for the court.

Delaware, etc., Tel. Co. v. Fleming, 555, 561 (4).

28. *Trial.—Directing Verdict.*—Where the issuable fact is one of negligence, it is the duty of the trial court to direct a verdict for defendant, if the evidence fails to establish one or more of the facts essential to a right of recovery.

Watt v. Mishawaka Paper, etc., Co., 682, 684 (1).

NEW TRIAL—

Ruling on motion for, see **APPEAL** 102.

The weight of the evidence is for the jury, but if it makes a mistake where the evidence is conflicting the trial court should grant a, see **EVIDENCE** 13.

The correctness of the court's approval of the amended final report of an executor may be tested by a motion for a, on the ground that the decision of the court is not sustained by sufficient evidence and is contrary to law, see **EXECUTORS AND ADMINISTRATORS** 9.

1. *Grounds.*—A new trial may be granted only upon the grounds permitted by statute.
Jones v. Bryan, 550, 551 (4).
2. *Grounds.—Error in Conclusions of Law.*—Error in a conclusion of law on a special finding of facts is not cause for a new trial.
Rooker v. Ludowici Celadon Co., 275, 280 (9).
3. *Waiver.—Motion in Arrest of Judgment.*—A motion for a new trial is waived if it is preceded by a motion in arrest of judgment.
New Albany, etc., Mills Co. v. Senior, 453, 456 (3).
4. *Answers to Interrogatories.—Evidence.*—A new trial is not warranted on the ground that a fact found by an answer to an interrogatory is not sustained by the evidence, unless the fact is one which is essential to the general verdict.
Jenney Electric Mfg. Co. v. Flannery, 397, 415 (18).
5. *New Trial as of Right.—Title to Real Estate.*—In an action involving title to real estate and to set aside a conveyance thereof, a new trial as of right may be had under §1110 Burns 1908, §1064 R. S. 1881.
Henry v. Frazier, 605, 610 (2).
6. *New Trial as of Right.—When Not Allowed.*—Where two or more substantive causes of action proceed to judgment in the same case, in one of which a new trial as of right may be granted, but the other not, the latter will control the procedure, and a new trial as of right will be denied.
Henry v. Frazier, 605, 610 (1).
7. *New Trial as of Right.—When Not Allowed.*—Where one paragraph of complaint involved the title to real estate and sought to set aside a conveyance of the same, and other paragraphs alleged the breach of a contract for care and support for which plaintiff asked damages, and that certain expenditures had been made which plaintiff sought to have declared a specific lien against the real estate in question, a new trial as of right was properly denied.
Henry v. Frazier, 605, 610 (3).

NON EST FACTUM—

Answer of, see **PLEADING** 18.

NOTICE—

Of appeal, see **APPEAL** 22.

Of peril, see **RAILROADS** 6.

NUISANCE—

1. *Abatement.—Judgment.—Sufficiency.*—Where the complaint in an action for the maintenance of a private nuisance sufficiently described such nuisance, a judgment reciting that "the nuisance set out and described in plaintiff's complaint be abated", is not void for uncertainty, since it may be made certain by reference to the complaint.
May v. George, 259, 261 (2).
2. *Abatement.—Limitation of Actions.—Application of Statute.*—Where a nuisance is of a character so permanent that it may fairly be said

NUISANCE—Continued.

that the entire damage accrues in the first instance, the statute of limitations begins to run from that time; but if the nuisance may be said to continue from day to day, and create a fresh injury each day, there still may be a right of action for the injuries created within the last six years, though the original right of action has been lost.
May v. George, 259, 262 (5).

3. *Action to Abate.—Evidence.—Statute of Limitations.*—In an action for the maintenance of a private nuisance, brought under §291 Burns 1908, §289 R. S. 1881, defining a nuisance to be that which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, evidence that a gutter, into which defendants poured soapsuds and other offensive matter, had been in existence for about fifty years and that defendants had obtained a prescriptive right to maintain the gutter, is insufficient to show that the action is barred by the statute of limitations, where the nuisance shown was a continuing one.

May v. George, 259, 262 (4).

OFFICERS—

See **CLERKS OF COURTS**.

OWNERSHIP—

Of note, see **EVIDENCE 6**.

Of property, see **MECHANICS' LIENS 12, 13**.

PAROL EVIDENCE—

See **EVIDENCE 7**.

PARTIES—

See **APPEAL 20, 21; FRAUD 1; MECHANICS' LIENS 7; PLEADING 8; WITNESSES 6, 7**.

Defect of, see **PLEADING 24**.

Intent of, see **SALES 2**.

PARTITION—

See **APPEAL 19**.

Conveyances.—Title Acquired.—Where the lands of a decedent were partly covered by the waters of a lake, and the commissioners appointed to partition the same among those to whom it had been devised, divided the land by a road into a large tract not fronting on the water's edge, and into a small tract adjoining the lake, and gave to each devisee a share in the large tract and also a strip having water on a part thereof, and in their report described the lands so set apart as "tracts" instead of by metes and bounds it will be presumed that such commissioners partitioned all of the land of the owner, so that the devisees, in receiving land described as "tracts between the road and the lake", thereby acquired the land under the waters of the lake.

Knickerbocker Ice Co. v. Surprise, 286, 296 (8), 297 (8).

PASSENGERS—

Carriage of, see **CARRIERS 1, 2**.

Injury to, see **CARRIERS 3-10**.

PAYMENT—

By surety, see SUBROGATION 2.
Of claim against estate, see SUBROGATION 9.
Of taxes, see LIFE ESTATE; SUBROGATION 10.
Voluntary, see SUBROGATION 3.

PERSONS—

Injury to, on tracks, see RAILROADS 39-51.

PLACE—

Safe, to work, see MASTER AND SERVANT 47, 48.

PLEADING.

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|-------------------------------|----------------------|
| I. FORM AND ALLEGATIONS, 1-3. | IV. DEMURRER, 23-25. |
| II. COMPLAINT, 4-17. | V. AMENDMENTS, 26. |
| III. PLEA OR ANSWER, 18-22. | VI. MOTIONS. |

See TENDER 2.

Amendment of, see APPEAL 105.

Amendment of, deemed made, see APPEAL 67.

Review as to, see APPEAL 67-72.

The rules of, in actions before justices of the peace remain the same where appeals are taken to the circuit court, see JUSTICES OF THE PEACE.

I. FORM AND ALLEGATIONS.

1. *Construction.—Inferences.*—Where the facts averred in a pleading admit of but one inference, the court will indulge such inference in aid of the pleading.
Judah v. F. H. Cheyne Electric Co., 476, 481 (3).
2. *Construction.—Theory.*—Ordinarily the theory of a pleading is to be determined not by its prayer alone, but by its averments taken in their entirety.
Brown-Ketcham Iron Works v. George B. Swift Co., 630, 641 (7).
3. *Certainty.—Motion to Make Specific.*—Where a motion to make more specific might properly have been sustained, it is not reversible error to overrule it, if the pleading is sufficiently specific to make apparent the precise nature of the charge the defendant is called upon to meet and defend.
Kinmore v. Cresse, 693, 696 (3).

II. COMPLAINT.

See CONVERSION 3-5; ELECTRICITY 1, 2; FRAUD 1, 2, 6; FRAUDULENT CONVEYANCES 1, 2; INJUNCTION 2; INSURANCE 1-3; MASTER AND SERVANT 8-12, 30, 31; MECHANICS' LIENS 4-10; MUNICIPAL CORPORATIONS 5; NEGLIGENCE 5-10, 15-17, 23; RAILROADS 13, 19, 20, 22, 33, 36, 47.

Objection to, see APPEAL 69, 107a.

Sufficiency of, see APPEAL 8, 12, 31; CONTRACTS 3; COVENANTS 2.

Sufficiency of other paragraph of, see APPEAL 72.

Where it is not alleged in the, that the contract relied on was in writing it will be presumed to be verbal, see CONTRACTS 2.

PLEADING—Continued.

For slander, where the words spoken are not slanderous *per se*, must show by innuendo, not only that the words were slanderously uttered, but were understood in the same slanderous sense by those in whose hearing they were spoken, see **LIBEL AND SLANDER 1**.

4. *Allegations of Complaint.—Evidentiary Facts.*—A complaint need not aver evidentiary facts in order that proof thereof may be admitted. *Lake Erie, etc., R. Co. v. Voliva*, 170, 175 (5).
5. *Actions Before Justices of the Peace.*—In actions commenced before justices of the peace, a complaint is good on demurrer if it contains sufficient substance to inform the adverse party of the nature of the demand against him and to bar another action for the same cause. *Gregory v. Redd*, 629, 630 (1).
6. *Initial Attack After Verdict.—Action Commenced Before Justice of the Peace.*—The complaint in an action commenced before a justice of the peace, from which defendant could know that the demand was for breach of a certain warranty, and which contained sufficient facts to bar another action for the same demand, was sufficient as against an attack made for the first time after the verdict of the circuit court to which the cause had been appealed. *Gregory v. Redd*, 629, 630 (2).
7. *Sufficiency.—Initial Attack on Appeal.*—A complaint in an action for personal injuries charging that defendant negligently maintained steps in the aisle of its opera house in an irregular and uneven condition, without providing lights of sufficient power to disclose such condition, and that such negligence was the proximate cause of plaintiff's injuries, stated facts sufficient to bar another action for the same cause, and was sufficient as against attack made for the first time on appeal. *Valentine Co. v. Sloan*, 69, 71 (1).
8. *Sufficiency.—Parties.*—Notwithstanding the liberal construction given to §263 Burns 1908, §262 R. S. 1881, providing that all persons having an interest in the subject of the action and in obtaining the relief demanded shall be joined as plaintiffs, the complaint must state a cause of action in favor of all the plaintiffs and must show that they have a common grievance and are each interested in the relief asked, or in some part of it, although their interests in the judgment need not be the same or equal. *Judy v. Jester*, 74, 85 (4).
9. *Sufficiency.—Negligence.*—A complaint against a railroad company for damages resulting to plaintiff's land from the obstruction of a natural watercourse and the excavation of a new channel through which the waters of the stream were diverted, is not objectionable for failure to aver a negligent construction of the artificial waterway, where facts are averred from which no other inference than that of negligence can be drawn. *Cleveland, etc., R. Co. v. True*, 156, 159 (1).
10. *Sufficiency.*—The objection that the action is upon a written instrument, and that neither the original nor a copy thereof is made a part of the complaint, is unavailing, where such objection does not appear upon the face of the pleading. *Rooker v. Ludowici Celadon Co.*, 275, 278 (3).
11. *Sufficiency.—Initial Attack on Appeal.*—A complaint, as against an attack made for the first time after judgment, is sufficient if it states facts sufficient to bar another suit for the same cause and does not wholly omit any essential averment. *Hillyard v. Robbins*, 107, 111 (4).
12. *Sufficiency.—Initial Attack on Appeal.*—A complaint, questioned for the first time on appeal, is sufficient, if there is not a total failure

PLEADING—Continued.

to state some element essential to recovery, and facts are stated sufficient to bar another action for the same cause.

Rooke v. Ludowici Celadon Co., 275, 277 (1).

13. *Sufficiency.—Recitals.*—The sufficiency of a complaint stating facts constituting all the elements of actionable negligence is not affected by the reason that it also contains the statement of facts by way of recital. *Pittsburgh, etc., R. Co. v. Foust*, 90, 95 (2).

14. *Sufficiency.—Inferences of Defense.*—Where all the essential averments of a cause of action are directly and positively stated, the mere inference of a defense to the action, suggested by any of the averments contained therein, will not render the complaint subject to demurrer. *Wabash R. Co. v. McNown*, 116, 135 (19).

15. *Sufficiency.—Aider by Verdict and Judgment.*—Where the defects in a complaint are such as to render it insufficient to withstand a demurrer, but no attack by demurrer is made, such defects are deemed cured by the verdict and judgment, if they were such as could be obviated by evidence.

Manufacturers Mut. Fire Ins. Co. v. Swaney, 429, 434 (5).

16. *Construction.*—The rule requiring the court, in case of doubt upon the pleading, to construe the same most strongly against the pleader and to indulge against its validity all reasonable inferences not excluded by a positive and direct averment, when applied to the construction of a complaint, is applicable to only such averments as are necessary to state the cause of action.

Wabash R. Co. v. McNown, 116, 134 (18)

17. *Theory.—Sufficiency of Paragraphs.*—A complaint must proceed upon a definite theory and the averments must be sufficient to support that theory, and, if there is more than one paragraph of complaint, each must be tested by its own averments and cannot be aided by the averments appearing in another.

Citizens Tel. Co. v. Fort Wayne, etc., R. Co., 230, 233 (1).

III. PLEA OR ANSWER.

See USURY 1-4; SCHOOLS AND SCHOOL DISTRICTS.

What constitutes a sufficient, of *non est factum*, see BILLS AND NOTES 4.

18. *Answer of Non Est Factum.—Failure to Verify.—Effect.*—A plea of *non est factum*, unverified, is equivalent to a general denial and nothing more. *Isgrig v. Franklin Nat. Bank*, 217, 220 (4).

19. *Answer of Non Est Factum.—Verification.—Waiver.*—The objection that a plea of *non est factum* is not verified cannot be waived, since the code contemplates that the effect of failing to deny the execution of the instrument under oath is to preclude defendant from controverting its execution on the trial.

Isgrig v. Franklin Nat. Bank, 217, 220 (5).

20. *Issues.—Variance.*—Where a defendant pleads and relies solely on an affirmative defense, he must, as a rule, recover according to the allegations of such answer, or not at all.

Mount Carmel, etc., Turnpike Co. v. Loos, 6, 9 (1).

21. *Plea in Abatement.—Requisites.—Certainty.*—A plea in abatement must be certain in every particular so as not only to point out the plaintiff's error, but to show him how it may be corrected in another suit in regard to the same cause of action, that is, it must leave nothing to be supplied by intendment or construction, and must obviate every supposable special answer.

Brown-Ketcham Iron Works v. George B. Swift Co., 630, 637 (1).

PLEADING—Continued.

22. *Set-off.—Sufficiency.*—In an action by a broker for commissions for the sale of certain canned goods, an answer by way of set-off alleging that plaintiff came into possession of a carload of canned goods belonging to defendant and sold the same for a certain sum, which he failed to pay over to defendant, and asking that such sum be set off against any amount found due plaintiff and for judgment for the excess, was sufficient as against a demurrer.

Gilbert v. First Nat. Bank, 611, 613 (1).

IV. DEMURRER.

See APPEAL 21.

Ruling on, see APPEAL 17, 69-71.

Ruling on, to answer, see APPEAL 68.

Overruling a, to a paragraph of reply that amounted to no more than an argumentative denial, and the facts pleaded therein were admissible under the general denial, was harmless, see APPEAL 109.

23. *Complaint.—Admissions.*—A demurrer to a complaint admits that all facts well pleaded are true.

Kelly-Atkinson Constr. Co. v. Munson, 619, 623 (1).

24. *Defect of Parties.*—A demurrer for defect of parties can only reach a defect of parties apparent from the complaint.

Bimel v. Boyd, 310, 312 (1).

25. *Complaint.—Admissions.*—That certain funds in the possession of a bank constituted a part of such bank's deposits is admitted by the demurrer to a complaint which alleged such fact.

Beard v. Peoples Sav. Bank, 185, 192 (8).

V. AMENDMENTS.

26. *Amendment to Conform to Proof.—Discretion of Court.*—By §§400, 403, 405 Burns 1908, §§391, 394, 396 R. S. 1881, the trial court has a very wide discretion in the matter of amendments of the pleadings to conform to the proof.

Hanlon v. Conrad-Kammerer Glue Co., 504, 510 (7).

VI. MOTIONS.

In arrest of judgment, see JUDGMENT 2.

To set aside default, see JUDGMENT 3.

Ruling on motion to make complaint more specific, see APPEAL 104.

POLICY—

Condition avoiding, see INSURANCE 6, 7.

PRECIPE—

For original copy, see APPEAL 26.

Only such papers and entries as are designated in the, are a part of the record on appeal, see APPEAL 24.

PREFERENCES—

See CORPORATIONS 4; FRAUDULENT CONVEYANCES 10-12.

PREMISES—

Condition of, see NEGLIGENCE 2-4.

Injury while on, of another, see NEGLIGENCE 18.

PREPONDERANCE—

The duty of producing a, of the evidence upon a given issue always rests upon the party having the affirmative of such issue, see EVIDENCE 8.

PRESUMPTIONS—

See APPEAL 73-80, 85, 87; ASSAULT AND BATTERY 3; BOUNDARIES 4; CONTRACTS 2; ELECTRICITY 1; EVIDENCE 3, 8, 9; HUSBAND AND WIFE 5; MASTER AND SERVANT 43; NEGLIGENCE 1; RAILROADS 4; STATUTES 2; WORK AND LABOR 1.

PRIMA FACIE CASE—

See INTOXICATING LIQUORS 8.

PROBATE—

The circuit courts in the exercise of their, jurisdiction, have the power to determine either legal or equitable questions, see COURTS 2.

PROCESS—

Service of, see CORPORATIONS 6, 10-15.

Service of, on foreign corporations, see CONSTITUTIONAL LAW 2.

1. *Constructive Service.—Judgment in Rem.*—In an action *in rem*, the court, by constructive service on a person residing beyond its territorial jurisdiction, whose property is sought to be affected or taken, may acquire such qualified or limited jurisdiction over the person as will enable it to render a judgment depriving him of such property.

Brown-Ketcham Iron Works v. George B. Swift Co., 630, 639 (6).

2. *Service.—Personal Judgment.*—A court cannot acquire jurisdiction over the person of one not residing within its territorial jurisdiction, so as to warrant a personal judgment, except by actual service of notice on him within the jurisdiction, or on one authorized to accept service in his behalf, or by his waiver of the want of due service.

Brown-Ketcham Iron Works v. George B. Swift Co., 630, 638 (5).

PROPERTY—

Injury to, see NEGLIGENCE 15, 16.

Taxable, see TAXATION 7-10.

Damage to, by fire, see RAILROADS 26, 27.

Ownership of, see MECHANICS' LIENS 12, 13.

Transfer of, exempt, see EXEMPTIONS 1, 2.

Bequests of personal, are absolute gifts, see WILLS 2.

Remedy of, owners, see MUNICIPAL CORPORATIONS 4, 5.

One may not be deprived of his, without due process of law, see CONSTITUTIONAL LAW 1.

PROXIMATE CAUSE—

See CARRIERS 9; MASTER AND SERVANT 39-42; NEGLIGENCE 21-23; RAILROADS 10, 14, 20, 49.

PUBLIC IMPROVEMENTS—

See MUNICIPAL CORPORATIONS 1-6; SUBROGATION 4.

QUESTIONS FOR JURY—

See MASTER AND SERVANT 23, 39; NEGLIGENCE 21, 24-28; RAILROADS 11, 29.

QUIETING TITLE—

See EXEMPTIONS 2, 4-7; TAXATION 5.

RAILROADS—

See ELECTRICITY 4.

Duty to passenger alighting from train, see CARRIERS 8, 10.

Operation of, see MASTER AND SERVANT 15.

1. *Crossing Accidents.—Duty to Look and Listen in Both Directions.*—As a general rule the courts will not say as a matter of law that a traveler should look and listen at a certain point or points, but he must look and listen for trains in both directions.
Chicago, etc., R. Co. v. Daun, 382, 388 (5).
2. *Crossing Accidents.—Duty to Look and Listen.*—The exercise of ordinary care requires a traveler to look and listen for an approaching car at points in the highway that are reasonably available for that purpose, and in some instances the exercise of due care may require him to stop and look and listen before attempting to cross the track, but this is usually a mixed question of law and fact to be determined by the jury under proper instructions.
Chicago, etc., R. Co. v. Daun, 382, 387 (3).
3. *Crossing Accidents.—Duty to Look and Listen.*—A traveler on approaching a railroad crossing must look both ways and listen attentively for approaching trains or cars, and must do all that a reasonably prudent person would do to prevent a collision before he attempts to cross.
Chicago, etc., R. Co. v. Daun, 382, 387 (1).
4. *Crossing Accidents.—Looking and Listening.—Presumptions.*—Where one who is injured in a crossing accident could have seen or heard an approaching train in time to escape, if he had looked and listened, it will be presumed either that he did not look and listen or that he did not heed what he saw or heard, and that he saw what he could have seen had he looked, and heard what he could have heard had he listened.
Chicago, etc., R. Co. v. Daun, 382, 387 (2).
5. *Crossing Accidents.—Unruly Team.—Look and Listen Rule.*—The look and listen rule applicable to the usual crossing cases, has no application where the entry upon the railroad track is due to a frightened team that has gotten beyond the driver's control, so that contributory negligence of a decedent, who was taken upon the track by an unruly team, is not necessarily shown by answers to interrogatories from which it does not appear that decedent stopped to look and listen.
Henry v. Hack, 47, 54 (5).
6. *Crossing Accidents.—Notice of Peril.*—A railroad company, as well as a person crossing its tracks, are each charged not only with actual knowledge, but with such knowledge as may be acquired by the exercise of ordinary care.
Henry v. Hack, 47, 55 (7).
7. *Crossing Accidents.—Right of Traveler to Rely on Signals.*—A traveler has a right to assume that the statutory crossing signals will be given, but he is not thereby relieved from exercising due care.
Chicago, etc., R. Co. v. Daun, 382, 387 (4).
8. *Crossing Accidents.—Negligence of Driver of Vehicle.—Contributory Negligence.—Imputation.*—The negligence of the driver of a vehicle in crossing a track in front of an approaching train cannot be imputed to a passenger in such vehicle who was killed by a collision with the train.
Wabash R. Co. v. McNown, 116, 129 (9).

RAILROADS—Continued.

9. *Crossing Accidents.—Perilous Position.—Duty of Railroad Employee.—Negligence.*—Where decedent was without fault placed in a perilous position upon a railroad track, the fatal consequences of which could have been seen and prevented by the motorman in the exercise of ordinary care, but which were not seen by him in time, no amount of care exercised after he saw can excuse his failure to see the peril in time to prevent the injury that followed.
Henry v. Hack, 47, 54 (6).
10. *Crossing Accidents.—Proximate Cause.—Failure to Signal Approach of Train.—Knowledge That Train is Approaching.*—Where a traveler approaching a railroad crossing knows that a train is approaching and knows such fact in time to stop and avoid injury, the failure of those in charge of the train to signal its approach to the crossing cannot be treated as the proximate cause of the injury.
Wabash R. Co. v. McNown, 116, 125 (4).
11. *Crossing Accidents.—Contributory Negligence.—Evidence.—Jury Question.*—The absence of contributory negligence may be shown by circumstances as well as by direct evidence, and if different conclusions may be drawn by fair and reasonably intelligent minds from the circumstances proven, the question is one of fact for the jury.
Chicago, etc., R. Co. v. Daun, 382, 389 (9).
12. *Crossing Accidents.—Liability.—Contributory Negligence of Driver of Vehicle.*—The contributory negligence of a hack driver in crossing a track in front of an approaching train, will not relieve the railroad company from liability for its negligence resulting in the killing of a passenger in such hack.
Wabash R. Co. v. McNown, 116, 135 (21).
13. *Crossing Accidents.—Speed.—Negligence.—Complaint.*—In an action to recover for the death of plaintiff's decedent in a crossing accident, where the complaint showed that the crossing was on the main street of a town, that the view of an approaching train was obstructed and that the company had for some time permitted an electric gong at the crossing to remain out of repair so that it constantly sounded without regard to whether a train was in fact approaching, and thus obstructed the sound of approaching trains, that the defendant railroad company knew the conditions and that the colliding train approached the crossing at a speed of thirty-five or forty miles per hour, the negligence of defendant in the operation of its train at such speed, was sufficiently shown, even in the absence of an ordinance of the town regulating the speed of trains.
Wabash R. Co. v. McNown, 116, 124 (2).
14. *Crossing Accident.—Proximate Cause.—Concurrent Negligence of Driver of Carriage.*—Where a train approaching at an excessive speed was invisible because of obstructions to the view, and the giving of the usual crossing signals could not be heard because of the constant sound of a defective electric gong which defendant maintained at the crossing, the act of a hack driver, who knew of the defective gong and that it constantly sounded regardless of the approach of trains, in crossing the track in front of the train in the face of warnings from persons near by, which he supposed were based on the sounding of the gong, cannot be held the sole proximate cause of a collision in which his passenger was killed, so as to relieve the railroad company from liability for its negligence in the manner of operating the train and in maintaining the defective gong.
Wabash R. Co. v. McNown, 116, 130 (12).
15. *Crossing Accidents.—Verdict.—Answers to Interrogatories.*—In an action against a railroad company for death in a crossing accident,

RAILROADS—Continued.

where it was shown by some of the answers of the jury to interrogatories that at certain places it would have been possible for plaintiff's decedent to have seen the approaching car, the general verdict for plaintiff is not thereby overcome, since presumptions may be indulged whereby such answers are reconcilable with the verdict, in view of the fact that there was no finding that decedent was familiar with the crossing or that he was aware that he could have seen the track at such points.

Chicago, etc., R. Co. v. Daun, 382, 389 (8).

16. *Crossing Accidents.—Verdict.—Answers to Interrogatories.*—Where the complaint in an action against a railroad company for the death of plaintiff's decedent in a crossing accident alleged negligence in failing to give the statutory signals of the approach of the train to the crossing, a verdict for plaintiff is a finding that such signals were not given, and is not overcome by answers to interrogatories showing that the whistle was sounded and that the bell was rung, but not showing that the same was done as provided by the statute.

Wabash R. Co. v. McNown, 116, 133 (16).

17. *Crossing Accidents.—General Verdict.—Answers to Interrogatories.*—Where, in an action for the death of plaintiff's decedent in a crossing accident, the complaint alleged facts showing that decedent's team had become frightened and had gotten beyond his control, and proceeded on the theory that the decedent was without fault in entering upon the track and that defendant's motorman either saw the peril of decedent in time to have prevented the collision by the exercise of ordinary care, or was guilty of original negligence in failing to discover and see decedent's peril, when by the exercise of reasonable care he should have done so, and that such negligence was the proximate cause of the death, answers to interrogatories showing that decedent was carried onto the track by his unruly horses, that freight cars on an adjacent steam road prevented the motorman from seeing decedent until he was less than fifty feet away, and that such motorman thereupon did all that he could to stop the car and avoid the injury, are not in irreconcilable conflict with a verdict for plaintiff, since they do not contradict the finding of the general verdict as to negligence in failing to see decedent's peril in time to have prevented the injury.

Henry v. Hack, 47, 49 (4).

- 18.—*Crossing Accidents.—Verdict.—Answers to Interrogatories.*—In an action to recover for a death in a railroad crossing accident, answers to interrogatories showing that the driver of the hack in which decedent was riding learned of the approach of the train as he approached the crossing, that there was nothing that would have prevented him from stopping his team or turning it away from the track in time to avoid injury, that before driving on to the track decedent indicated to the driver that the train was approaching and requested him to stop before driving on to the track, that the hack cleared the track in front of the train without being struck, but that decedent was thrown out, or in some other manner escaped from the rear of the hack, etc., and was injured, and that the train gave the statutory signals of its approach to the crossing, are not in irreconcilable conflict with a general verdict for plaintiff as showing contributory negligence on the part of the decedent.

Wabash R. Co. v. McNown, 116, 127 (8).

19. *Crossing Accidents.—Answers to Interrogatories.—Conflict With Complaint.*—In an action against a railroad company for the death of an occupant of a hack by collision with defendant's train at a crossing, answers by the jury to interrogatories showing that the

RAILROADS—Continued.

train did not collide with the horses or the vehicle, that neither the driver, horses, nor vehicle were injured, and that after the hack had cleared the track the decedent was thrown or in some other way escaped, from the hack and fell so as to come in contact with the train whereby she received injuries causing her death, were not at variance with the allegations of the complaint that as the wheels of the hack struck the rails of the railroad the decedent was thrown or caused to fall from said hack upon the railroad, and that the approaching train ran against or over her body and inflicted injuries from which she immediately died.

Wabash R. Co. v. McNown, 116, 129 (11).

20. *Crossing Accidents.—Failure to Signal Approach of Train.—Proximate Cause.—Complaint.*—Where the complaint for death of a person in a railroad crossing accident alleged negligence in defendant's failure to signal the approach of the train to the crossing, other allegations showing that the driver of the vehicle, in which decedent was a passenger, knew that an electric gong maintained by defendant to sound the approach of trains to the crossing was out of repair so that it constantly sounded regardless of the approach of trains, and that the driver was told by the occupants of the vehicle and others that a train was approaching, will not justify the assumption that the driver knew that a train was approaching, where a view of the approaching train was obstructed and the sounding of the gong prevented such driver from hearing its approach, so as to preclude the holding that the alleged negligence of defendant was the proximate cause of the injury.

Wabash R. Co. v. McNown, 116, 125 (5).

21. *Construction.—Diversion of Watercourse.—Duty of Railroad Company.*—Although under the grant of power given by subd. 5, §5195 Burns 1908, §3903 R. S. 1881, a railroad company may fill up a natural watercourse and lay its tracks on the embankment constructed in the bed of such stream, it is charged by the same section with the duty of providing a waterway no less efficient than the one appropriated. *Cleveland, etc., R. Co. v. True*, 156, 160 (4).

22. *Failure to Signal Approach of Train to Crossing.—Negligence Per Se.—Complaint.*—The failure to give the signals required by statute of a train's approach to a crossing is negligence *per se*, and the averment of such failure in a complaint is a sufficient charge of negligence, unless its effect is lost by other controlling averments.

Wabash R. Co. v. McNown, 116, 126 (6).

23. *Operation.—Crossing Signals.*—Crossing signals given only at a time when the train is so near the crossing as to render such signals unavailable as notice, do not serve the purpose intended by statute and will not relieve the company from liability.

Wabash R. Co. v. McNown, 116, 134 (17).

24. *Operation.—Speed.—Negligence.*—Although the running of a train at thirty-five or forty miles an hour through a town or city in violation of an ordinance is negligence *per se*, in the absence of a statute or ordinance the question of whether the operation of a train at such speed is negligence depends upon the conditions, situation and circumstances in each particular case.

Wabash R. Co. v. McNown, 116, 123 (1).

25. *Operation.—Gongs at Crossings.—Negligence.*—In the absence of a law imposing the duty on railroads to maintain electric gongs at crossings to sound the approach of trains, the failure of a railroad company so to do is not actionable negligence; but, if such gong is installed, the company's act in permitting it to become defective so as to sound continually without regard to the approach of a

RAILROADS—Continued.

train, and thus destroy or partially destroy the efficacy of other signals which the law makes necessary, is such negligence as will render the company liable for damages proximately caused thereby.

Wabash R. Co. v. McNown, 116, 124 (3).

26. *Damage to Property.—Fires.—Instructions.*—In an action against a railroad company for damages from fire, an instruction on the measure of damages, which included statements of the measure of damages, on items outside the issues and the evidence, and also told the jury that it might add interest "to any such element of damages as the jury may see fit to award damages for," was misleading and erroneous. *Baltimore, etc., R. Co. v. Peck*, 281, 285 (6).
27. *Damage to Property.—Fires.—Instructions.*—Instructions, in an action against a railroad company for damages from fire, that if the fire which destroyed plaintiff's land occurred before the fire which escaped from defendant's right of way, the defendant need not account for the origin of the fire which destroyed plaintiff's property, and that if defendant negligently permitted fire to escape, the jury could not find against it, if it further found that plaintiff's land was burned over by a fire which occurred prior to the fire which defendant allowed to escape, correctly stated the law applicable to the facts as assumed therein.
Baltimore, etc., R. Co. v. Peck, 281, 283 (1).
28. *Fires.—Inferences.—Negligence.*—Proof of a fire after a locomotive has passed will not of itself warrant an inference of negligence in the equipment or operation of the train.
Toledo, etc., R. Co. v. Home Ins. Co., 459, 464 (4).
29. *Fires.—Negligence.—Jury Question.—Appeal.*—In an action against a railroad company to recover for a fire loss, the question of defendant's negligence is ordinarily a question of fact for the jury, and its finding will not be disturbed on appeal if the evidence is such that fair-minded men may honestly draw different conclusions therefrom.
Toledo, etc., R. Co. v. Home Ins. Co., 459, 463 (3).
30. *Fires.—Negligence.—Evidence.—Sufficiency.*—In an action against a railroad company to recover for a fire loss, evidence of facts and circumstances from which the jury may fairly infer that defendant's locomotive was either defective in its condition or negligently operated, and that the emission of sparks was unusual in quantity or character, is sufficient to warrant a jury in inferring that defendant was negligent.
Toledo, etc., R. Co. v. Home Ins. Co., 459, 462 (2).
31. *Fires.—Liability.*—While a railroad company may use fire in the operation of its locomotives and is relieved from liability for injury occasioned by the escape of fire which necessarily results from the operation of its locomotives, it is liable for negligence in failing to properly equip such locomotives with proper spark arresters, or in operating such locomotives so as to negligently cause or permit the emission of sparks therefrom.
Toledo, etc., R. Co. v. Home Ins. Co., 459, 461 (1).
32. *Fires.—Negligence.—Evidence.—Sufficiency.*—In an action against a railroad company for the destruction of plaintiff's house by fire, evidence that large blazing sparks were being emitted from the passing train and that when the fire department arrived, which was about twenty minutes after the train had passed, the side of the house nearest the track was entirely burned away, and that at the time there was no fire in any of the stoves, and there was no fire anywhere in close proximity, is sufficient to warrant the jury in inferring that the building was set on fire by the passing train,

RAILROADS—Continued.

and the court cannot say as a matter of law that the defendant was not negligent. *Toledo, etc., R. Co. v. Home Ins. Co.*, 459, 464 (5).

33. *Injury to Live Stock.—Complaint.—Evidence.—Admissibility.*—Where the complaint against a railroad company for injury to stock substantially followed the language of §5447 Burns 1908, Acts 1885 p. 224, so as to sufficiently charge defendant with a breach of its duty under such statute to construct and maintain fences and cattle-guards sufficient to prevent stock from getting on its tracks, any evidence was admissible which would prove or tend to prove a violation of such duty.

Lake Erie, etc., R. Co. v. Voliva, 170, 174 (4).

34. *Injury to Live Stock.—Contributory Negligence.—Abandonment of Stock.*—The conduct of the owner of horses in undertaking, without help, while riding one horse and leading another, to drive horses over a railroad highway crossing, could no more than tend to prove contributory negligence, and did not indicate an abandonment of the horses so as to prevent a recovery for those that escaped over the cattle-guards and went upon the track where they were injured.

Lake Erie, etc., R. Co. v. Voliva, 170, 175 (6).

35. *Injury to Live Stock.—Failure to Maintain Cattle-guards.—Application of Statute.*—The liability created by §5447 Burns 1908, Acts 1885 p. 224, requiring railroads to construct and maintain proper cattle-guards, is not limited to injury to stock led or controlled by halter or bridle.

Lake Erie, etc., R. Co. v. Voliva, 170, 176 (8).

36. *Injury to Live Stock.—Failure to Maintain Fences and Cattle-Guards.—Complaint.—Sufficiency.*—A complaint against a railroad company to recover for injury to plaintiff's horses, which substantially follows the language of §5447 Burns 1908, Acts 1885 p. 224, imposing upon railroad companies the duty of constructing and maintaining fences and cattle-guards sufficient to prevent stock from getting on such railroads, is sufficient to charge a violation of the duty imposed by such statute.

Lake Erie, etc., R. Co. v. Voliva, 170, 174 (3).

37. *Injury to Live Stock.—Defective Cattle-guards.—Contributory Negligence.*—Contributory negligence is not a defense in an action against a railroad company for injury to live stock resulting from defendant's failure to properly maintain cattle-guards.

Lake Erie, etc., R. Co. v. Voliva, 170, 176 (7).

38. *Injury to Live Stock.—Defective Cattle-guards.—Evidence.—Sufficiency.*—In an action for injury to horses alleged to have strayed onto defendant's railroad track through a defective cattle-guard, evidence that there was no pit under the guard, that the spaces between the rails or slats out of which it was made had become partly filled with gravel and cinders, that the beveled edges of the slats had become worn and beaten down, that snow had fallen on them two nights previous to the injury and had not been removed, that there was a well-beaten path over the guard on and over which the stock passed, and that defendant's track men passed over such guard but a short time before the stock passed over it and that they made no effort to clean the snow therefrom, warranted a finding that at the time the defendant was not maintaining and keeping such cattle-guard in the condition contemplated by §5447 Burns 1908, Acts 1885 p. 224, and that on account of such failure plaintiff's horses entered upon the track.

Lake Erie, etc., R. Co. v. Voliva, 170, 176 (9).

39. *Injury to Persons on Tracks.—Last Clear Chance.—Instructions.*—Where the negligence of plaintiff continues up to the time of the injury and concurs with that of defendant in producing the injury,

RAILROADS—Continued.

the doctrine of last clear chance is not applicable, so that, in an action for injuries in being struck by an interurban car while driving upon defendant's track, an instruction was erroneous which stated that even if plaintiff was guilty of negligence in driving upon the track, he may nevertheless recover, if a motorman by the exercise of ordinary care could have discovered his peril and avoided the collision. *Terre Haute, etc., Traction Co. v. Latham*, 366, 370 (4).

40. *Injury to Persons on Tracks.—Last Clear Chance.*—The doctrine of last clear chance is applicable in the case of one who was struck by an interurban car while driving upon defendant's track, although he got upon the track through his own negligence, if, by reason of defects in the street, for which defendant was responsible, and the frightened condition of plaintiff's horse, plaintiff was unable, by the exercise of due care, to extricate himself from the danger in time to avoid the injury, and if by the exercise of due care by defendant the injury could have been prevented.

Terre Haute, etc., Traction Co. v. Latham, 366, 371 (5).

41. *Injuries to Persons on Tracks.—Negligence.—Contributory Negligence.—Imputing Driver's Negligence to Person Injured While Riding in Vehicle.*—The negligence, if any, of plaintiff's father in driving his wagon, in which she was riding, across defendant's railroad tracks, cannot be attributed to plaintiff.

Henry v. Epstein, 265, 271 (3).

42. *Injury to Persons on Tracks.—Verdict.—Answers to Interrogatories.*—In an action for injuries to plaintiff by the collision of defendant's car with a wagon in which plaintiff was riding with her father, who was the driver, a verdict for plaintiff is not affected by answers to interrogatories that could only affect the question of negligence of plaintiff's father in driving onto the track.

Henry v. Epstein, 265, 271 (5).

43. *Injuries to Persons on Tracks.—Verdict.—Answers to Interrogatories.*—Where plaintiff was injured by the collision of one of defendant's cars with a wagon in which plaintiff was riding with her father, who was the driver, answers by the jury to interrogatories, to be sufficient to warrant the court in setting aside the verdict for plaintiff, must affirmatively show either that plaintiff's injury did not result from any of the negligent acts of defendant charged in the complaint as being the proximate cause thereof, or that the negligence of plaintiff's father in driving across the track in front of the car was the sole proximate cause of her injury, rather than a concurring cause.

Henry v. Epstein, 265, 271 (4).

44. *Injury to Persons on Tracks.—Employe of Construction Company.—Evidence.—Sufficiency.*—In an action for negligent death on the defendant's railroad track of one claimed to have been employed by a contractor at the time engaged in installing a signal system for defendant, there could be no recovery by plaintiff in the absence of proof that a contract existed between decedent's employer and defendant whereby decedent was authorized to go upon the tracks.

Pittsburgh, etc., R. Co. v. Foust, 90, 97 (6).

45. *Injury to Persons on Tracks.—Employe of Construction Company.—Evidence.—Sufficiency.*—In an action for negligent death on the defendant's railroad track of one claimed to have been employed by a contractor at the time engaged in installing a signal system for defendant, evidence merely showing that the contractor was installing a signal system was not sufficient to show contractual relation between him and defendant that would authorize decedent to

RAILROADS—Continued.

be upon defendant's tracks, where it was shown that three railroads crossed at the particular place.

Pittsburgh, etc., R. Co. v. Foust, 90, 97 (7).

46. *Injury to Persons on Tracks.—Employe of Construction Company.—Negligence.—Evidence.—Sufficiency.*—Where the negligence charged was in an attempt to make a flying switch whereby decedent was run over by a cut of cars while he was on defendant's tracks in the employ of a construction company engaged in installing a signal system, and the undisputed evidence showed that decedent's work did not require him to go upon the tracks, that decedent at his own request was permitted to walk up the west-bound main track some distance to procure a pick, that on looking back he saw a train approaching from the east and he stepped over on the east-bound track and was run down and killed by a cut of cars running west and pushed by an engine, that there was nothing to obstruct decedent's view of the approaching cut of cars, and it was not shown that the cut of cars was being run at a rapid and dangerous speed, nor that defendant's servants had any knowledge of decedent's presence at the place of injury, a judgment for plaintiff is not supported by sufficient evidence.

Pittsburgh, etc., R. Co. v. Foust, 90, 97 (8).

47. *Injury to Persons on Tracks.—Complaint.—Sufficiency.*—Where decedent, who was killed by one of defendant's trains while he was on the track in the employ of a contractor engaged in installing a signal system for defendant, the allegation of the complaint that decedent's duty required him to be upon the tracks at the place where the injury occurred and that he was there by invitation of defendant, with the full knowledge of defendant, its servants and agents, was sufficient to raise a legal duty against defendant to the same extent as if decedent had been one of defendant's employes.

Pittsburgh, etc., R. Co. v. Foust, 90, 96 (5).

48. *Injuries to Persons on Tracks.—Licensees.*—The rule that a mere licensee enjoys the license subject to its attendant risks and concomitant perils, and that the only duty owing to a licensee by one granting the license is to protect him from wilful injury, is not applicable where a railroad company had contracted for the installation of a system of interlocking devices and had licensed decedent, as an employe of the contractor, to go upon its tracks in carrying on the work of installation, but such rule is to be confined to cases where the licensee is granted permission to go upon the premises of the owner for purposes of his own, and in which the owner has no interest.

Pittsburgh, etc., R. Co. v. Foust, 90, 95 (3).

49. *Interurban —Injuries to Persons on Tracks.—Proximate Cause.—Answers to Interrogatories.*—Where plaintiff was injured by an interurban car while proceeding along the highway in a wagon with her father, answers by the jury to interrogatories showing that plaintiff's father was driving along the south side of the road, and that while so driving, a few minutes prior to the accident, plaintiff and her father saw a car about 1400 feet ahead of them approaching on the south track, and that plaintiff's father then immediately turned his horses across the north track, on which the car that collided was approaching, the court cannot say as a matter of law that the act of plaintiff's father in suddenly turning the wagon onto the north track was the sole proximate cause of plaintiff's injury.

Henry v. Epstein, 265, 273 (7).

50. *Interurban.—Injuries to Persons on Tracks.—Issues of Fact.—Submission to Jury.*—In an action against an interurban railroad

RAILROADS—Continued.

company on the theory that plaintiff's horse became unmanageable and ran upon the track, that because of the fright of the horse and the defective condition of the track he was unable to control the horse and escape from the track, and that the collision was caused either by the motorman's failure to use ordinary care to prevent the injury after plaintiff was exposed to the danger, or by the excessive and dangerous speed of the car, and the theory of the defense was that there was not sufficient time to stop the car after plaintiff got upon the track, that plaintiff's failure to escape from the track was not due to any defects therein, and that the collision was not due to the excessive speed of the car, it was the court's duty to submit the question of fact to the jury for its decision.

Terre Haute, etc., Traction Co. v. Latham, 366, 369 (1).

51. *Interurban.—Injury to Persons on Tracks.—Verdict.—Answers to Interrogatories.*—Where, under the averments of the complaint, in an action for injuries sustained through the collision of an interurban car with a wagon in which plaintiff was riding with her father, who was driving, plaintiff was entitled to prove excessive speed of the car before the collision, and other facts from which the jury could infer that the motorman did not have the car under proper control when plaintiff's father first drove upon the track, so that the motorman's later efforts could not prevent the collision that followed, answers to interrogatories showing that at the time of the collision the speed of the car was not excessive, and that as soon as plaintiff's father started across the track the motorman sounded the gong and whistle and thereafter did everything in his power to prevent collision, will not control a verdict for plaintiff.

Henry v. Epstein, 265, 272 (6).

52. *Location of Division Buildings.—Maintenance.—Contract.—Evidence.*—In an action for damages against a railroad company on account of the removal of its shops, etc., to another city, plaintiff alleging that he purchased certain real estate in the town where such shops, etc., were originally located because of defendant's representations that it would locate and maintain its shops, etc., there, evidence of certain written contracts, neither of which contained any agreement that defendant would permanently maintain its shops, etc., in such town, and the representations of defendant's officers as to the intended permanency of such location of shops, etc., was insufficient to support a judgment for plaintiff on the theory of a contract between defendant and plaintiff binding defendant to maintain its shops, etc., at such town. *Wabash R. Co. v. Grate*, 583, 597 (6).

53. *Tracks in Highway.—Duty to Restore and Maintain Highway in Condition.*—Where a railroad company has constructed its track in a highway, it must restore the highway to a reasonable condition of safety and convenience in view of the new use to which it has been appropriated, and must thereafter use reasonable care to maintain it in such condition, but the company is not an insurer against all defects, and is not required to go beyond the exercise of proper care and skill under the circumstances to prevent injury to the person or property of others.

Terre Haute, etc., Traction Co. v. Latham, 366, 369 (2).

54. *Tracks in Highway.—Duty to Restore and Maintain Highway in Condition.—Instructions.*—An instruction that the law requires a railway company to construct and maintain its tracks so that the public may use the highway with reasonable safety, that the company is liable for injuries proximately resulting from failure so to do, and that whether a particular highway is reasonably safe for

RAILROADS—Continued.

public travel is a question for the jury under all the conditions and circumstances of the particular case, is erroneous in imposing upon defendant the absolute duty to maintain the highway in a condition reasonably safe for use, and in failing to submit the further question of whether the defects, if the jury found the highway unsafe, were due to a want of care and skill on the part of defendant.

Terre Haute, etc., Traction Co. v. Latham, 366, 370 (3).

REASONABLE CARE—

See NEGLIGENCE 25, 26; WORDS AND PHRASES.

RECEIVERS—

1. *Appointment.—Authority.—Employment of Attorney.*—A receiver appointed to take charge of and hold all money and bonds arising out of the assessment for certain street improvement, until a determination could be had of the rights of various claimants to the same, was merely a custodian of the funds and had no power to employ an attorney, or to incur expense in any other manner, where the order of appointment directed that he should file an inventory, and that he should do no other act as such receiver pending the final judgment and until otherwise ordered by the court.

Bullock v. Clarke, 112, 114 (1).

2. *Employment of Attorneys.—Discretion of Court.*—The necessity of permitting attorneys to assist a receiver in protecting the funds and property in his hands for the benefit of all persons interested, and the amount of allowance that should be made out of the trust estate for such services, are within the discretion of the trial court, and its determination will not be disturbed on appeal unless there is manifest error.

Bullock v. Clarke, 112, 115 (2).

3. *Attorneys.—Right to Compensation from Trust Estate.*—In an action by a contractor against several claimants to money and bonds arising from the assessments for a street improvement constructed by plaintiff, to recover a balance alleged to be due him under the contract, where the court appointed a receiver to take charge of the money and bonds and to hold same pending the final judgment in the cause, and it was finally adjudged that plaintiff was not entitled to any of such money or bonds, the attorney for the plaintiff, who was not employed by and rendered no services for the receiver, was not entitled to compensation out of the funds held by the receiver, even on the theory that his services were beneficial in preventing a dissipation of the funds.

Bullock v. Clarke, 112, 115 (3).

RECOUPMENT—

See USURY 6.

REDEMPTION—

See TAXATION 5.

REFORMATION—

Of inebriate, see DRUNKARDS 2.

RELEASE—

Reply to Answer of Release.—Sufficiency.—Where the complaint proceeded on the theory that a certain sum was due plaintiff for services rendered upon an implied contract, upon which plaintiff had

RELEASE—Continued.

received certain credits, and the answer averred the payment of a certain sum which plaintiff accepted and for which she executed a receipt purporting to be in full settlement of all claims, a reply to such answer admitting the payment, but charging that so much of the receipt as purports to be in full settlement is fraudulent, was not insufficient on the theory that it is an attempt to rescind for fraud without returning the amount paid, since under her theory plaintiff had a right to give credit for the payment and sue for the balance, and she was not obliged to adopt the theory presented by the answer. *Kirklin v. Clark*, 358, 361 (1).

REMEDY AT LAW—

Inadequacy of, see **INJUNCTION** 1, 2.

REMISSION—

An appellant cannot complain of the remitting of the verdict against it, see **APPEAL** 122.

REPRESENTATIONS—

Of value, see **FRAUD** 3.

REPUTATION—

Injury to, see **ASSAULT AND BATTERY** 3.

RES GESTAE—

The declarations of an agent while actually transacting the business which his principal authorized him to transact are admissible as a part of the, see **EVIDENCE** 10.

RESULTING TRUSTS—

See **TRUSTS** 1-4.

REVERSAL—

Overruling a motion to strike out certain parts of an answer, even if error, is not cause for, see **APPEAL** 107.

REVIEW—

See **APPEAL** 47-121.

Right of, see **APPEAL** 16-19.

REVOCATION—

Of agent's authority, see **CORPORATIONS** 8.

RIGHTS—

Of creditors, see **EXECUTORS AND ADMINISTRATORS** 1; **SALES** 2.

Of heirs, see **SUBROGATION** 9-11.

Of purchaser, see **EXEMPTIONS** 2.

Of creditor to procure preference, see **FRAUDULENT CONVEYANCES** 12.

Of wife of mortgagor, see **MORTGAGES** 1.

RULES—

Courts have the inherent power to make, for the proper conduct of their business, and which do not conflict with the statutes, see **COURTS** 1.

SAFETY APPLIANCES—

See MASTER AND SERVANT 11, 49.

SALES—

Tax, see TAXATION 4-6.

Execution, see EXEMPTIONS 1-3.

Unlawful, see INTOXICATING LIQUORS 6-9.

1. *Delivery*.—Where personal property is sold for a valuable and fair consideration, the sale is complete between the parties without an actual delivery. *Gilbert v. First Nat. Bank*, 611, 617 (3).
2. *Intent of Parties*.—*Rights of Creditors*.—A corporation, though indebted to a broker for commissions earned in selling its goods, may sell its property to a bank in satisfaction of loans, and in the absence of a fraudulent intent such sale will stand notwithstanding it operates to the disadvantage of such broker in the collection of such commissions. *Gilbert v. First Nat. Bank*, 611, 617 (4).

SAVINGS BANKS—

Surplus of, see TAXATION 10.

SCHOOLS AND SCHOOL DISTRICTS—

1. *Township Trustee*.—*Powers*.—*Notice*.—The power and authority of a township trustee are purely statutory, and all persons contracting with him are bound to know the extent of his authority and that he can create no binding obligation beyond the scope of the authority conferred on him by statute. *Mitcheltree School Tp. v. Baker*, 472, 474 (1).
2. *Teachers*.—*Action on Contract*.—*Answer*.—*Sufficiency*.—In an action by a teacher to recover the wage stipulated in the contract, which was in excess of the minimum wage provided by §6599 Burns 1908, Acts 1907 p. 146, an answer alleging that no sufficient funds were on hand at the time of executing the contract, that sufficient funds were not available for the payment of more than the minimum wage, and that the contract was unauthorized, stated a good defense to the action. *Mitcheltree School Tp. v. Baker*, 472, 476 (4).
3. *Teachers*.—*Contracts*.—*Township Reform Act*.—While to the extent that the minimum wage must be paid, and the minimum school term taught, as provided by §6599 Burns 1908, Acts 1907 p. 146, and §6411 Burns 1908, Acts 1899 p. 424, the contract between a teacher and the township trustee has been definitely fixed by the legislature and is not affected by the provisions of the township reform act (§§9590-9602 Burns 1908, Acts 1899 p. 150, Acts 1901 p. 415), a contract for the payment of more than the minimum wage is within the provisions of the township reform act and is not enforceable as to the amount in excess of the minimum wage unless an appropriation for the payment of same has been duly made by the advisory board. *Mitcheltree School Tp. v. Baker*, 472, 474 (2).

SERVICE—

See PROCESS 1, 2.

Of process, see CORPORATIONS 6, 10-15.

SET-OFF—

Sufficiency of answer by way of, see PLEADING 22.

SIGNALS—

Crossing, see RAILROADS 23.

Right of traveler to rely on, see RAILROADS 7.

SPECIAL FINDINGS—

See TRIAL 16-18.

SPEED—

See RAILROADS 13.

STATUTES—

See ALIENS 1-2; CORPORATIONS 6, 7; DRUNKARDS 3; EXEMPTIONS 3; MASTER AND SERVANT 12, 14, 15, 38; MECHANICS' LIENS 1; MUNICIPAL CORPORATIONS 6; TAXATION 7; WITNESSES 5-7, 9.

1. *Conflict With Act of Congress.—Validity.*—A state law which is in conflict with an act of Congress is invalid.

State, ex rel. v. Quill, 495, 498 (3).

2. *Construction.—Subsequent Enactments.—Presumptions.*—The legislature is presumed to be acquainted with existing laws, and, in legislating on any subject, to have the same in view, and to take cognizance of the construction placed on any statute by the courts of last resort.

Town of Jasper v. Cassidy, 678, 680 (3).

3. *Construction.—Legislative Intent.*—The legislative intent will be carried out when it can be ascertained from the act, and where two constructions are possible, that one which gives effect to the act will be adopted rather than the one which would defeat the purpose of the law.

Brown-Ketcham Iron Works v. George B. Swift, Co. 630, 652 (18).

4. *Construction.—Meaning of Words.*—In the construction of a statute the language used will be accepted in its ordinary and popular meaning, unless so to do will defeat the legislative intent, in which event the words may be given a particular or technical meaning so as to effectuate such intent.

Vollmer v. Board, etc., 149, 153 (2).

5. *Construction.—Legislative Intent.*—In construing a statute the legislative intent is to be ascertained from an examination of the whole as well as separate sections or parts of an act, and such intent, when so ascertained, will control the strict letter of the statute, or the literal import of the words or terms, if adherence to such strict letter or literal import would lead to injustice, absurdity or contradictory provisions.

Vollmer v. Board, etc., 149, 153 (1).

STOCK—

Abandonment of, see RAILROADS 34.

STOCKHOLDERS—

A dividend is not a debt due, until it has been rightly declared, see CORPORATIONS 3.

STREETS—

See MUNICIPAL CORPORATIONS 6, 8.

Occupation of, see TELEGRAPHS AND TELEPHONES 3.

Use of, see TELEGRAPHS AND TELEPHONES 5, 6.

SUBROGATION—

See MUNICIPAL CORPORATIONS 3; MORTGAGES 2.

1. *Superiority of Equities.*—Where there is no superior equity, or where the equities are equal, subrogation cannot be successfully invoked.

Nelson v. McKee, 344, 354 (4).

SUBROGATION—Continued.

2. *Payment by Surety.*—A surety seeking the benefit of subrogation must show that he has paid the obligation for which his principal was primarily liable.
American Fidelity Co. v. East Ohio, etc., Co., 335, 340 (2).
3. *Voluntary Payments.—Payment of Claim Against Estate.*—An heir, having a personal interest in an estate, who paid claims against the estate, was not a volunteer within the rule that a volunteer is not entitled to subrogation. *Chamness v. Chamness*, 225, 228 (1).
4. *Volunteers.—Public Improvements.—Contracts.—Compensation.—Assignment.*—One who pays the debt of a municipal contractor at his request, or who advances or loans him money with which to carry on the contract, is not a mere volunteer, and the payment of such debt or the making of such advances will support an assignment of the contractor's compensation.
American Fidelity Co. v. East Ohio, etc., Co., 335, 339 (1).
5. *Right to Subrogation.—Volunteer.*—Subrogation is a creature of equity, but it is not applicable in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable, and it is not allowed where it would work any injustice to the rights of others.
Nelson v. McKee, 344, 348 (2).
6. *Right to Subrogation.*—The fact that money is furnished to pay off existing liens, or for like purposes, on new security which afterwards proves to be defective or insufficient, is not a sufficient showing to give to such person the right of subrogation under the liens or claims so paid.
Nelson v. McKee, 344, 353 (3).
7. *Right of Subrogation.*—The right of subrogation, being founded on principles of equity and justice, is broad enough to include every instance in which one party, not a mere volunteer, pays the debt of another, primarily liable, and which in good conscience and equity should have been paid by the latter.
Chamness v. Chamness, 225, 228 (3).
8. *Right to Subrogation.—Purchaser of Mortgage.*—Where, subsequent to the execution of a mortgage on property, a judgment lien was acquired against the property, and thereafter a depositor of the bank holding such mortgage took an assignment of mortgage, which was reported to the mortgagor, who consented thereto provided the interest rate be reduced, which was done, and a new mortgage was thereupon made to such depositor who released the original mortgage of record, such depositor did not become subrogated to the rights of the bank so as to make his rights under the second mortgage superior to the judgment lien, and consequently the purchaser of the land, who assumed to pay such subsequent mortgage, acquired no right of subrogation under such original mortgage.
Nelson v. McKee, 344, 354 (7).
9. *Rights of Heirs.—Payment of Claim Against Estate.*—An heir who, with the knowledge and consent of other heirs, paid a note owing by the decedent, for the purpose of avoiding the expense of formal administration, was entitled to subrogation to the rights of the creditor.
Chamness v. Chamness, 225, 228 (4).
10. *Rights of Heirs.—Payment of Taxes.*—Although by §10340 Burns 1908, Acts 1897 p. 226, an administrator, who fails to pay the taxes against an estate when due, is not entitled to any credit for the penalty occasioned by the delinquency, an heir who pays such taxes, in a case where such payment is necessary to prevent a sale, is entitled to recover the payments from the estate on the principle of subrogation.
Chamness v. Chamness, 225, 229 (6).

SUBROGATION—Continued.

11. *Rights of Heirs.—Expenses of Administration.*—Where, upon a voluntary distribution of a decedent's property, made for the purpose of avoiding formal administration, certain live stock was given to one of the heirs, and the administrator, who was subsequently appointed, permitted such live stock to remain in the custody of such heir until sold, such heir was entitled to recover for his services in feeding and caring for same, and while such charge is more properly a cost of administration, rather than a claim against the estate, it is one to which the doctrine of subrogation applies.

Chamness v. Chamness, 225, 229 (5).

SURETY—

See SUBROGATION 2.

SURVEYS—

See EVIDENCE 2.

TAXATION—

See BANKS AND BANKING.

Taxes on real estate should be paid by the life tenant, see LIFE ESTATE. Street improvement statutes are considered an exercise of the power of, see MUNICIPAL CORPORATIONS 7.

1. *Policy of State.*—It is the settled policy of the State to subject all property to taxation except that which is by law exempt.
Beard v. Peoples Sav. Bank, 185, 191 (5).
2. *Power of State.—Capital Stock of National Banks.*—The capital stock of a national bank invested in government bonds is not subject to taxation as against the bank, although such fact may not affect the right of the State to tax the certificates or shares of stock in the hands of the stockholder.
Beard v. Peoples Sav. Bank, 185, 192 (7).
3. *Power to Tax.—Constitutional Law.*—The power to tax is inherent in the legislature, and §1, Art. 10 of the Constitution, making it the duty of the legislature to select the property subject to taxation and to prescribe regulations for its just valuation, is a limitation of that power.
Beard v. Peoples Sav. Bank, 185, 190 (3).
4. *Tax Sales.—Time for Redemption.—Infancy.*—The time within which an infant or other person suffering under legal disability may redeem from a tax sale, is two years after the removal of the disability.
Figgins v. Figgins, 43, 46 (4).
5. *Tax Sales.—Redemption.—Quieting Title.*—If the time has not expired in which the owner by reason of his disability may redeem his land from sale for taxes, the holder of the tax deed cannot quiet title against him.
Figgins v. Figgins, 43, 46 (6).
6. *Tax Sales.—Disability of Owner.—Tax Deeds.—Duty of Auditor.*—The county auditor has no authority to determine whether a landowner is suffering under disability, but he must, on request, issue the tax deed, after expiration of two years from date of sale.
Figgins v. Figgins, 43, 46 (5).
7. *Property Taxable.—Statutes.*—Section 10142 Burns 1908, Acts 1891 p. 199, providing that all property within the jurisdiction of the State, not expressly exempted, shall be subject to taxation, is broad enough to include all forms of property whether real or personal.
Beard v. Peoples Sav. Bank, 185, 190 (4).
8. *Property Taxable.—Money.—Credits.*—Money is personal property and as such is subject to taxation under the provisions of §10143

TAXATION—Continued.

Burns 1908, Acts 1891 p. 199, and under the same section all forms of indebtedness are personal property and subject to be taxed.

Beard v. Peoples Sav. Bank, 185, 190 (2).

9. *Property Taxable.—Investments in Nontaxable Securities.—Surplus Funds of Savings Bank.*—Funds invested in nontaxable securities cannot be reached for taxation, so that the surplus fund of a savings bank, having authority to invest in such securities, thus invested on the first day of March in the year in which it was sought to be taxed, was not subject to taxation.

Beard v. Peoples Sav. Bank, 185, 192 (6).

10. *Property Taxable.—Savings Banks.—Surplus.*—The surplus fund of a savings bank organized and conducted under the provisions of §§3348-3401 Burns 1908, §§2703-2757 R. S. 1881, Acts 1901 p. 155, Acts 1903 pp. 211, 321, viewed in the light of the statute, is held by the trustees of the bank in a quasi trust capacity, and is not taxable to the depositors, but, in view of the statutes on the subject of taxation in general, and those relating to the taxation of savings banks in particular, such fund is subject to taxation as against the bank.

Beard v. Peoples Sav. Bank, 185, 189 (1), 190 (1), 191 (1).

TEACHERS—

Action to recover wage stipulated in contract, see **SCHOOLS AND SCHOOL DISTRICTS** 2, 3.

TEAMS—

Unruly, see **RAILROADS** 5.

TELEGRAPHS AND TELEPHONES—

See **ELECTRICITY** 4.

1. *Defective Wires.—Evidence.—Notice.*—In order to recover for injuries caused by the defective condition of telephone wires along a highway, it is not necessary that the evidence should establish the fact that defendant had actual notice of the defect.

Home Tel. Co. v. Weir, 466, 470 (4).

2. *Defective Wires.—Notice.—Instructions.*—In an action for damages caused by a defective telephone wire along a street, an instruction from which the jury could infer that, if defendant had notice of the condition of the wires in any part of the town, it would be charged with notice of the defect at the point where plaintiff was injured, was erroneous.

Home Tel. Co. v. Weir, 466, 471 (5).

3. *Operation.—Maintenance.—Occupation of Streets.—Duty.*—It is the duty of a telephone company to exercise ordinary care to use and maintain its wires along and over streets so as to prevent the same from becoming dangerous, but such duty is not absolute.

Home Tel. Co. v. Weir, 466, 469 (2).

4. *Operation.—Maintenance.—Instructions.*—In an action for injuries to plaintiff's eye caused by the defective condition of a telephone line along a street, the defect in an instruction imposing on defendant the absolute duty to so maintain its wires as not to obstruct or render dangerous the use of the street was not rendered harmless by the further statement, "if it negligently failed to so maintain its wires, then it must respond in damages."

Home Tel. Co. v. Weir, 466, 470 (3).

5. *Use of Streets.*—The occupancy of the streets of a city by a telephone system is a proper street use, expressly recognized by §8696 Burns 1908, Acts 1905 p. 219, §93, but such use must not obstruct

TELEGRAPHS AND TELEPHONES—Continued.

or unnecessarily interfere with the primary use of the streets for the passage of people and vehicles.

Delaware, etc., Tel. Co. v. Fleming, 555, 563 (6).

6. *Use of Streets.—Negligence.*—In an action against a telephone company for injury to plaintiff's horse by coming in contact with a guy wire, where the evidence showed that the wire was within the sidewalk line and not an obstruction to that part of the street used for the passage of horses and vehicles, the fact that the end of such wire, where it was attached to the ground anchor, projected one and one-half inches at right angles from the wire, does not constitute negligence rendering defendant liable for the injuries complained of, where it is not shown that the projecting end had anything to do with such injuries.

Delaware, etc., Tel. Co. v. Fleming, 555, 564 (8).

7. *Construction.—Negligence.—Evidence.*—In an action against a telephone company for injury to plaintiff's horse alleged to have been caused by coming in contact with a guy wire erected and maintained within the sidewalk line, where the undisputed evidence showed the size and presence of such wire and the manner and method of placing and maintaining same, and that the method of maintaining such wire was the usual and customary method and proper in all respects except in the matter of the projecting end, all of which was undisputed, and it was conceded by plaintiff that a guy wire was necessary, and it is in no way shown that such projecting end had anything to do with the injury, the question of defendant's negligence was not a question of fact, but one of law for the court.

Delaware, etc., Tel. Co. v. Fleming, 555, 561 (5).

TENDER—

1. *Sufficiency.—Conditional Offer to Pay.*—An offer to pay the amount due on a mortgage or other lien, on condition that such lien shall be satisfied and released of record before the money is surrendered, is insufficient to operate as a tender.

Masson v. Indiana Lighting, etc., Co., 376, 381 (8).

2. *Pleading.—Sufficiency.*—In an action on a promissory note by one who had purchased it without notice, but had paid less than its full value, and, before paying the full value, had received notice of a credit to which the maker was entitled, allegations in the answer of a tender by the maker of the balance due after deducting the amount of such credit, which plaintiff refused to accept, were sufficient as to tender.

Certain v. Smith, 163, 169 (6).

TESTIMONY—

Weight of, see WITNESSES 1.

THEATRES AND SHOWS—

1. *Care Required of Proprietor.*—One who conducts a theatre for reward or profit to which the general public are invited, must use ordinary and reasonable care to make the premises as reasonably safe as is consistent with the practical operation of the same.

Valentine Co. v. Sloan, 69, 72 (3).

2. *Injury to Persons.—Assumption of Risk.*—The doctrine of assumption of risk does not apply in the case of a person injured by reason of the unevenness of the steps in an aisle of an opera house, where it appears in evidence without contradiction that plaintiff had never been in the building before and had no knowledge of the condition of the steps, and the jury found that she was unable to see their condition.

Valentine Co. v. Sloan, 69, 72 (2).

TIME—

Of suing to set aside and cancel as void a contract for the construction of a sewer, see MUNICIPAL OWNERSHIP 5.

TITLE—

Acquired, see PARTITION.

Plaintiff need not prove, to real estate in order to recover for trespass, proof of possession being sufficient, see TRESPASS.

TOLLS—

Failure to pay, see TURNPIKES AND TOLL ROADS 2.

TOOLS—

See MASTER AND SERVANT 29.

TOWNSHIP REFORM ACT—

A contract for the payment of more than the minimum wage is within the provisions of the, and is not enforceable as to the amount in excess of the minimum wage unless an appropriation for the payment of same has been made, see SCHOOLS AND SCHOOL DISTRICTS 3.

TOWNSHIPS—

Township Reform Act.—Advisory Boards.—The purpose of the township reform act is to prevent unwise and unnecessary expenditure of public funds, and under that act the advisory boards of the various townships of the State are alone authorized to allow the contracting of debts against their respective townships, and then only in the manner provided by statute.

Mitcheltree School Tp. v. Baker, 472, 475 (3)

TOWNSHIP TRUSTEE—

The power and authority of a, are purely statutory, and all persons contracting with him are bound to know the extent of his authority, see SCHOOLS AND SCHOOL DISTRICTS 1.

“TRACTS”—

See WORDS AND PHRASES.

TRACKS—

In highway, see RAILROADS 53, 54.

Injury to persons on, see RAILROADS 39-51.

TRESPASS—

Continuous, see INJUNCTION 1.

Trespass to Real Estate.—Elements of Recovery.—Title.—Plaintiff need not prove title to real estate in order to recover for trespass, proof of possession being sufficient.

Knickerbocker Ice Co. v. Surprise, 286, 294 (5).

TRIAL.

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| I. COURSE AND CONDUCT OF TRIAL, 1. | V. ANSWERS TO INTERROGATORIES, 12-15. |
| II. RECEPTION OF EVIDENCE, 2, 3. | VI. SPECIAL FINDINGS, 16-18. |
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I. COURSE AND CONDUCT OF TRIAL.

1. *Province of Court and Jury*.—In the trial of a civil cause it is the province of the jury to ascertain the facts, and not to determine whether such facts are unlawful, since it is for the court to determine the law of the case. *Timmons v. Kenrick*, 490, 492 (2).

II. RECEPTION OF EVIDENCE.

2. *Issues.—Burden of Proof*.—An answer in general denial imposes on the plaintiff the burden of proving the material facts averred in the complaint by a fair preponderance of the evidence. *Floyd v. Fordyce*, 449, 451 (3).
3. *Admission of Improper Evidence Without Objection.—Consideration*.—When evidence, which might have been excluded if proper objection had been made, has been allowed to go before the court, it may be considered for whatever probative value it may have. *Wagner v. Meyer*, 223, 225 (4).

III. DIRECTION OF VERDICT.

4. *Requisites of Instruction*.—Where the court directs a verdict in the event the jury finds from the evidence certain facts to exist, the instruction should embrace all the facts and conditions essential to such a verdict. *Neely v. Louisville, etc., Traction Co.*, 659, 667 (6), 668 (6).
5. *Evidence*.—Where there is no dispute as to the facts involved, nor as to the inferences that may be properly drawn therefrom, the court should direct a verdict; but if any facts are made to appear from the evidence about which reasonable and fair-minded men might differ, the case should be submitted to the jury. *Watt v. Mishawaka Paper, etc., Co.*, 682, 684 (2).

IV. INSTRUCTIONS.

See APPEAL 27, 110-117; ASSAULT AND BATTERY 1, 2; BOUNDARIES 6, 7; CARRIERS 3-6; INTOXICATING LIQUORS 9; MASTER AND SERVANT 7, 26, 45-47; NEGLIGENCE 13; RAILROADS 26, 27, 39, 54; TELEGRAPHS AND TELEPHONES 2, 4.

Review as to, see APPEAL 58-66.

Refusal to give, cannot be considered on appeal, when such instruction neither appears in the record nor in appellant's brief, see APPEAL 5.

6. Instructions must be relevant to the issues and pertinent to the evidence, and, unless they are, their giving is reversible error, where it does not clearly appear that the complaining party was not harmed thereby.

Baltimore, etc., R. Co. v. Peck, 281, 285 (5).

7. *Special Instructions*.—The giving of a general instruction does not authorize the refusal of a particular instruction applicable to the issues and the evidence, but a party is entitled, upon proper request, to have an instruction given on his own theory of the case, if there is evidence fairly tending to support it.

Baltimore, etc., R. Co. v. Peck, 281, 284 (3).

TRIAL—Continued.

8. *Erroneous Instructions.—Cured by Other Instructions.*—An instruction which in effect directs a verdict if certain facts are found to exist, but which is erroneous for omitting an element essential to such verdict, cannot be cured by other instructions given in the case.
Neely v. Louisville, etc., Traction Co., 659, 669 (8).
9. *Weight of Evidence.—Province of Jury.*—It is not the province of the court to advise the jury as to the weight or value of evidence, and an instruction which indicates that a particular class of evidence is to be given greater weight than other evidence, is erroneous as invading the province of the jury.
North v. Jones, 203, 214 (10).
10. *Burden of Proof.—Misleading Jury.*—An instruction stating that the burden of showing that a section line is not a straight line is upon the party who claims that the line was not straight in fact, and if the evidence as to the line being straight or otherwise, is of equal weight, the presumption that the line was straight would not be overthrown, was obscure and misleading.
North v. Jones, 203, 213 (8).
11. *Province of Jury.—Weight of Evidence.*—In an action of ejectment in which a material question for determination was the location of the stone marking the northeast corner of the section, an instruction that evidence was introduced tending to establish a prolongation of the line from the northwest corner to the middle section corner and thence to the east line, which tended to show that such line would be 6½ feet north of the fence built by defendant at the northwest corner of plaintiff's land and 12.62 feet north of the post at the east end of such fence, and stating that if the jury believed said line to be the north line of the section its verdict should be for plaintiff, gave undue prominence to such evidence, in view of the fact that there was other evidence differing as to the location of such line, and invaded the province of the jury.
North v. Jones, 203, 210 (3).

V. ANSWERS TO INTERROGATORIES.

See APPEAL 79, 83-93; CARRIERS 6, 7; MASTER AND SERVANT 1-3, 22; MECHANICS' LIENS 3, 8, 11, 12; NEGLIGENCE 12; NEW TRIAL 4; RAILROADS 15-19, 42, 43, 49, 51.

As a general rule it is improper in tort actions to require the jury to answer interrogatories itemizing the elements of damage, where it is unnecessary to plead such elements of damage, see DAMAGES.

12. *Construction.*—If an interrogatory is doubtful in its meaning, the doubt will be resolved in favor of the general verdict.
Jenney Electric Mfg. Co. v. Flannery, 397, 404 (5).
13. *Rights of Jury.*—The jury is not confined to the mere statement of the witnesses to reach conclusions with respect to the evidence, but may infer, from circumstances proven, the facts found in answer to interrogatories.
Kirklin v. Clark, 358, 363 (4).
14. *Effect.*—Answers by the jury to interrogatories showing that a fact was not established with certainty, or that there was no possibility of the jury ascertaining such fact with certainty, do not amount to a finding that such fact was not established by a preponderance of the evidence.
Jenney Electric Mfg. Co. v. Flannery, 397, 404 (4).
15. *Propriety.—Action for Damages.*—In an action against a railroad company for damages resulting from the filling of a creek and diverting the water through a new channel constructed by defendant,

TRIAL—Continued.

the court did not err in refusing to submit to the jury interrogatories requested by defendant asking the market value per acre of plaintiff's bottom lands both before and after the filling and relocation of the creek, and asking the market value per acre of the farm other than the bottom lands both before and after such filling and relocation, since the plaintiff could not under the issues prove his damages piecemeal and the ultimate fact to be found was the damage to the farm as an entirety.

Cleveland, etc., R. Co. v. True, 156, 161 (6), 162 (6).

VI. SPECIAL FINDINGS.

See APPEAL 54, 94-101; DEEDS 6; EXECUTORS AND ADMINISTRATORS 5; FRAUD 6.

16. *Failure to Find Essential Fact.*—Where the facts are specially found, the failure to find a material fact is equivalent to a finding against the party having the burden of proving same.

Nelson v. McKee, 344, 347 (1).

17. *Issues.*—To sustain a decision for plaintiff, the special findings must cover all the facts essential to recovery under the issues tendered by his complaint, and the failure to find any such fact is the equivalent of a finding against him.

Judah v. F. H. Cheyne Electric Co., 476, 483 (6).

18. *Sufficiency of Real Estate Descriptions.*—The rule that a description of real estate is insufficient, if an officer is unable to locate the land without the exercise of an arbitrary discretion, is applicable to the description of land in a special finding of facts rendered by the court.

Marker v. Town of Andrews, 179, 183 (2).

VII. VERDICT.

See APPEAL 55-57, 79, 81-87, 93; MASTER AND SERVANT 1-3, 35; RAILROADS 15-18, 42, 43, 51.

Initial attack after, see PLEADING 6, 7, 11, 12.

An appellant cannot complain of the remitting of the, against it, see APPEAL 122.

19. *Effect.*—A general verdict for plaintiff is a finding in his favor upon every material averment of the complaint.

Kingan & Co. v. Foster, 511, 514 (1).

20. *Scope.*—A general verdict for plaintiff is a finding in his favor upon every material allegation of the paragraph of complaint on which such verdict rests.

Hammond v. Kingan & Co., 252, 255 (3).

21. *Scope.*—A general verdict for plaintiff is a finding that every material averment of the complaint was proved.

Henry v. Hack, 47, 49 (2).

22. *Scope and Effect.*—The general verdict covers the whole issue and solves every material fact against the party against whom it is rendered.

Southern R. Co. v. Willis, 34, 38 (2).

23. *Answers to Interrogatories.—Conflicting Answers.*—Conflicting answers by the jury to interrogatories nullify each other and do not affect the general verdict.

Jenney Electric Mfg. Co. v. Flannery, 397, 403 (3).

24. *Answers to Interrogatories.*—A general verdict is to be found upon all the evidence, and each interrogatory is to be answered from the evidence without reference to the general verdict or to the answer to any other interrogatory.

Cleveland, etc., R. Co. v. True, 156, 162 (11).

TRIAL—Continued.

25. *Answers to Interrogatories.—Control.*—A general verdict is not overcome by answers to interrogatories unless the latter are in such conflict with the former as to be irreconcilable upon any supposable state of facts provable under the issues.
Henry v. Hack, 47, 49 (3).
26. *Answers to Interrogatories.*—Where the jury's answers to interrogatories are in irreconcilable conflict with the general verdict, beyond the possibility of removal by any evidence properly admissible under the issues, judgment should be rendered on the answers.
Kingan & Co. v. Foster, 511, 514 (2).
27. *Interrogatories to Jury.—Duty of Court.*—It is the duty of the court to require the jury to answer pertinent and material interrogatories when properly requested in case a general verdict is returned, and, in a proper case, the court's refusal to do so is reversible error.
Cleveland, etc., R. Co. v. True, 156, 162 (9).
28. *Answers to Interrogatories.—Control.*—To enable a party against whom a general verdict is rendered to successfully interpose the special findings on particular questions of fact, as ground for judgment in his favor, such special findings must stand in such clear antagonism to the general verdict that the two cannot coexist.
Southern R. Co. v. Ellis, 34, 38 (3).
29. *Answers to Interrogatories.*—A general verdict for plaintiff is a finding in his favor on all the issues presented by the pleadings, and is not overcome by the jury's answers to interrogatories unless they are so antagonistic that they and the verdict cannot coexist upon any reasonable hypothesis.
Chicago, etc., R. Co. v. Daun, 382, 388 (6).
30. *Special Findings.—Object of Special Findings.*—The object of the special finding is to control the general verdict, if, under the law the particular facts found are inconsistent therewith, and also to test the correctness of such general verdict.
Cleveland, etc., R. Co. v. True, 156, 162 (10).

TRUSTS—

A fraudulent grantee holds the land conveyed to him in fraud of the grantor's creditors, in trust for such creditors, see FRAUDULENT CONVEYANCES 7.

1. *Resulting Trusts.—Creation.*—A resulting trust must arise, if at all, at the time of the execution of the conveyance.
Scott v. Dilley, 100, 106 (6).
2. *Resulting Trusts.—Enforcement.—Lapse of Time.*—Equity will not enforce an alleged trust, the nature of which is rendered obscure by time and acquiescence.
Scott v. Dilley, 100, 106 (5).
3. *Resulting Trusts.—Creation.*—Defendant in a partition suit, who sought by cross-complaint to establish a trust in the property involved, had the burden of proving the material averments of such cross-complaint.
Scott v. Dilley, 100, 106 (7).
4. *Resulting Trusts.—Evidence.—Sufficiency.*—Evidence showing that a husband and wife joined in a conveyance of the wife's land, and about the same time bought another farm which was taken in the name of the husband, and that some part of the proceeds of the first farm was used in the purchase of the second one, is in itself insufficient to show a resulting trust in favor of the wife, or her heirs, in the land so purchased in the name of the husband, under the provisions of §4019 Burns 1908, §2976 R. S. 1881.
Scott v. Dilley, 100, 104 (4).

TRUSTS—Continued.

5. *Enforcement.—Limitation of Actions.*—Although the statute of limitations does not commence to run against a trust until it has been openly disavowed, evidence, in an action to establish a resulting trust, from which the trial court may have inferred that if the trust had ever in fact been created, the acts and conduct of the holder of the legal title since 1878 were such as to indicate an open disavowal, authorized a recovery on answers setting up the twenty years' statute of limitations. *Scott v. Dilley*, 100, 107 (8).

TURNPIKES AND TOLL ROADS—

1. *Action for Penalties.—Action Commenced Before Justice of the Peace.—Special Defense.—Pleading.*—In an action commenced before a justice of the peace to collect a penalty for failure to pay toll, the defendant, under §1749 Burns 1908, §1460 R. S. 1881, providing that all matters of defense, except the statute of limitations, set-off, and matter in abatement, may be given in evidence without plea, may show that plaintiff's road was out of repair for an unreasonable time without pleading such fact, since §4574 Burns 1908, §3684 R. S. 1881, making it lawful, in a suit for the collection of a penalty for failure to pay toll, to plead the want of repair in bar of the suit, was not intended to change the procedure in actions commenced before justices of the peace.
Mount Carmel, etc., Turnpike Co. v. Loos, 6, 9 (3).
2. *Action for Penalties.—Non-Payment of Toll.—Defenses.—Failure to Repair Road.*—Under §4525 Burns 1908, §3635 R. S. 1881, providing that if a company shall suffer its road to be out of repair to the hindrance or delay of travelers for an unreasonable length of time, it shall have no right to collect tolls thereon until the same is repaired, and §4574 Burns 1908, §3684 R. S. 1881, providing that when a toll road is permitted to be out of repair for a longer time than would be required to make the necessary repairs, the owner shall not be entitled to collect tolls on that portion that is out of repair while it remains in such condition, a finding for defendant was authorized in an action for the collection of a penalty for failing to pay toll, where it was shown that of plaintiff's road, which was two miles long, one-fourth was out of repair for an unreasonable length of time before defendant refused to pay, and there was evidence that the remainder was not in good condition.
Mount Carmel, etc., Turnpike Co. v. Loos, 6, 10 (4).

USES—

Conflicting, see **ELECTRICITY** 1-3.

USURY—

1. *Answer.—Sufficiency.*—In an action on a note and to foreclose a chattel mortgage, an answer showing that the property covered by the mortgage belonged to defendant, although she had made affidavit that it was her husband's property to enable him to procure the loan secured by the mortgage, and that the several payments made by the husband from time to time, and after his death by the defendant, exceeded the amount of the loan and the legal rate of interest to the time of the trial, is not objectionable on the ground that, being an attempt to recoup usurious interest paid by defendant's deceased husband, it does not directly aver that defendant was the heir or personal representative of the husband, or that she was in privity with him. *Jones v. Bryan*, 550, 552 (6).

USURY—Continued.

2. *Defenses.—Who May Make.*—The defense of usury may not be set up by a stranger, but is personal to the debtor or borrower and his privies by law, blood, contract, or estate.
Jones v. Bryan, 550, 553 (8).
3. *Defenses.—Who May Plead.*—Under the statute giving a widow a portion of her deceased husband's estate, she becomes a privy with him so that she is enabled to avail herself of the defense of usury against his debts.
Jones v. Bryan, 550, 554 (10).
4. *Defenses.—Persons in Privity.*—A wife who permitted her husband to execute a mortgage upon her piano to secure his debt, and, after his death, was obliged to assume the debt to save her piano, was not a stranger to the original transaction, nor a mere volunteer, but had an interest therein entitling her to plead the defense of usury.
Jones v. Bryan, 550, 553 (9).
6. *Recoupment.*—The right given a debtor by §7953 Burns 1908, §5201 R. S. 1881, to recoup all interest paid in excess of the legal rate, also exists at common law.
Jones v. Bryan, 550, 553 (7.)

VACATION—

Appeal, see APPEAL 22, 23.

VARIANCE—

See CONTRACTS 1.

VEHICLES—

Contributory negligence of driver of, see RAILROADS 12.

VENDOR'S LIEN—

Enforcement of, see HUSBAND AND WIFE 4.

VENUE—

Change of Venue.—Time of Application.—Where the rules of the trial court provided that a motion for change of venue must be filed three days before the date of trial, except when it appears by affidavit that the reasons for the change were not known before that time, a defendant, though not served with summons, was not entitled to a change of venue in the absence of a showing why the application was not filed within the prescribed time, where the record disclosed defendant's prior appearance by counsel and a continuance of the cause by agreement of the parties.
Knickerbocker Ice Co. v. Surprise, 286, 292 (4).

VERDICT—

See TRIAL 19-30.

VERIFICATION—

Failure to verify plea of *non est factum*, see PLEADING 19.

VICE PRINCIPALS—

See MASTER AND SERVANT 45.

VIOLATION—

Of statutory duty, see MASTER AND SERVANT 21.

WAIVER—

See APPEAL 23; INSURANCE 6, 7-9, 11; MECHANICS' LIEN 14-16; PLEADING 19.

Of lien, see APPEAL 100.

Of error, see APPEAL 17; 39-46.

WARRANTY—

Breach of, see COVENANTS.

WIFE—

See HUSBAND AND WIFE.

Rights of, of mortgagor, see MORTGAGES 1.

Rights of surviving, see DESCENT AND DISTRIBUTION 4.

WILLS—

1. *Time of Taking Effect.*—A will speaks as of the date of the death of the testator. *Gynn v. Wabash, etc., Trust Co.*, 391, 395 (4).
2. *Construction.—Disposition of Personal Property.*—Bequests of personal property are absolute gifts unless something appears in the will to the contrary, since it is a *prima facie* rule of construction that a testator by his will disposes of his entire estate. *Hillis v. Dils*, 576, 580 (3).
3. *Construction.—Disposition of Real and Personal Property in Same Words.*—Where a will purports to dispose of real estate and personal property in the same words, and in the same connection, and it is manifest that the testator intended both to go together, it will be so construed. *Hillis v. Dils*, 576, 580 (2).
4. *Construction.—General Rule.*—In the construction of a will, the court should take into consideration all its provisions, and from them place such a construction thereon, consistent with the established principles of law, as will carry into effect the general scheme and purpose of the testator. *Hillis v. Dils*, 576, 580 (4).
5. *Construction.—Disposition of Personal Property.*—Where a testatrix devised her home to her daughter "subject to the conditions hereinafter stated," and in another clause gave all the residue of her estate to her grandsons and to such daughter, and provided that on the death of the daughter before the death of the grandchildren the legacies given her should go to them to the exclusion of her surviving husband, an unrestricted gift to the daughter was thereby indicated in which such grandsons had no vested rights, so that they could have no claim against the estate of such daughter as to her share under such will for any sum beyond that which might remain at her death. *Hillis v. Dils*, 576, 580 (5).
6. *Determinable Fee.—Nature of Interest.*—The owner of a determinable fee in real estate has all the right of an owner in fee simple in regard to the use or disposal of the real estate, save that his fee is liable to be defeated at any time by the occurrence of the designated contingency, and that in the event of a sale by him, his purchaser would also take a determinable fee. *Hillis v. Dils*, 576, 581 (6).
7. *Disposition of Personal Property.—Enjoyment by Holder of Defeasible Interest.*—Although one who holds only a limited interest in personal property bequeathed to him may not use it in a manner destructive of the rights of others interested therein, the holder of a defeasible absolute interest in personal property has the right to get the full benefit of it, even to the extent of using it in such a way that it may be consumed. *Hillis v. Dils*, 576, 581 (7).

WITHDRAWAL—

From State, see CORPORATIONS 8.

"WITH EXCHANGE"—

See WORDS AND PHRASES.

WITNESSES—

1. *Credibility.—Weight of Testimony.*—The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given to their testimony. *Lawlor v. State, ex rel.*, 24, 29 (5).
2. *Credibility.—False Testimony.—Effect.*—Where a jury believes that a witness testified wilfully to a falsehood as to certain matters, it has a right to disregard his entire testimony. *Lawlor v. State, ex rel.*, 24, 29 (4).
3. *Cross-Examination.*—On cross-examination a party is clearly within his rights in asking a witness, who has testified as to values, any question pertinent to the direct examination which tends to test the knowledge of values as given by such witness. *Cleveland, etc., R. Co. v. True*, 156, 161 (7).
4. *Requiring Incompetent Witness to Testify.—Discretion of Court.*—The determination of whether the court is justified in exercising the discretion granted by §526 Burns 1908, Acts 1883 p. 102, authorizing it to require parties or other persons to testify in certain cases of incompetency, must depend upon the particular facts in each case. *Myers v. Manlove*, 327, 333 (6).
5. *Power of Court to Require Witness to Testify.—Statutes.*—The power of the court to require a witness to testify, under §526 Burns 1908, Acts 1883 p. 102, authorizing the court in its discretion to require a party or other person, in certain cases of incompetency, to testify, is not limited to unwilling witnesses. *Myers v. Manlove*, 327, 330 (3).
6. *Competency.—Parties.—Nature of Action.—Statutes.*—An action to obtain a money judgment on a promissory note is not included in the subject-matter of §522 Burns 1908, §499 R. S. 1881, rendering parties incompetent to testify in suits by or against heirs or devisees on a contract with or demand against the ancestor, to obtain title to or possession of property in the right of such ancestor, or to affect the same in any manner. *Myers v. Manlove*, 327, 329 (1).
7. *Competency.—Parties.—Action by Heirs Instead of Personal Representative.—Statutes.*—An action by the widow and only son of a decedent to recover on a note payable to decedent, is one which in contemplation of statute and the ordinary course of procedure is brought by the personal representative of the decedent, and is therefore controlled by §521 Burns 1908, §498 R. S. 1881, providing that in suits in which an administrator or executor is a party, wherein a judgment may be rendered for or against the estate, any party whose interest is adverse to such estate is incompetent to testify as to matters occurring in the lifetime of the decedent. *Myers v. Manlove*, 327, 330 (2).
8. *Competency.—Nature of Action.—Action by Heirs.*—Under §522 Burns 1908, §499 R. S. 1881, providing that in suits by or against heirs, founded on a contract with the ancestor, to obtain title to or possession of property in the right of such ancestor, or to affect the same, neither party shall be a competent witness as to matters occurring before the ancestor's death, the defendant, in an action on a note received by plaintiff from his ancestor by gift *inter vivos*.

WITNESSES—Continued.

was not disqualified to testify as to facts and circumstances connected with the execution and delivery of the note to the ancestor, since the action was not by or against heirs, and was not to obtain title to or possession of property in the right of the ancestor, or to affect the same in any manner. *Snyder v. Frank*, 301, 306 (2).

9. *Requiring Incompetent Witness to Testify.—Discretion of Court.—Statutes.*—In an action on a note by the widow and only son of the deceased payee, the court, after holding that defendant was incompetent, in requiring him to testify, pursuant to the provisions of §526 Burns 1908, Acts 1883 p. 102, authorizing the trial court in its discretion to require parties or other persons to testify in certain cases of incompetency, did not abuse its discretion, where there was evidence, though remote and indefinite, which tended to establish the defense, and the facts presented were such as in all probability impressed the court that the ends of justice would be thereby subserved. *Myers v. Manlove*, 327, 331 (5), 333 (5).

WORDS AND PHRASES—

"Business," see CEMETERIES; *East Hill Cemetery Co. v. Thompson*, 417, 421 (2).

"Charitable Association," see CEMETERIES; *East Hill Cemetery Co. v. Thompson*, 417, 421 (2).

"Diligent," meaning of, see MASTER AND SERVANT 44; *Kingan & Co. v. Foster*, 511, 516 (7).

"Diligent use of his faculties," see MASTER AND SERVANT 44; *Kingan & Co. v. Foster*, 511, 516 (7).

"Dust," what is within meaning of statute, see MASTER AND SERVANT 11; *Jenney Electric Mfg. Co. v. Flannery*, 397, 402 (1).

"Judges" does not include "justices of the peace," see EXTRADITION 3; *Vollmer v. Board, etc.*, 149, 154 (4), 155 (4).

"Laborer," meaning of, see MASTER AND SERVANT 32.

Land bordering on a lake and conveyed as a "lot," what includes, see BOUNDARIES 2; *Knickerbocker Ice Co. v. Surprise*, 286, 295 (7), 300 (7).

"Reasonable care," what is, see MASTER AND SERVANT 16; NEGLIGENCE 25.

"With exchange" effect of use on a bill otherwise negotiable, see BILLS AND NOTES 9; *South Whitley Hoop Co. v. Union Nat. Bank*, 446, 447 (1).

"Tracts," see PARTITION; *Knickerbocker Ice Co. v. Surprise*, 286, 296 (8), 297 (8).

"Judge."—"Justice of the Peace."—The term "justice of the peace" has a definite meaning to designate one who presides over a particular court of inferior jurisdiction, and "judge" ordinarily is used to designate the person who holds a judicial office authorizing him to transact the business of a court whose jurisdiction is superior to that of a justice of the peace.

Vollmer v. Board, etc., 149, 155 (6).

WORK AND LABOR—

1. *Contracts.—Presumptions.*—Where the relation of parent and child did not exist between plaintiff and defendant, and plaintiff could not inherit any of defendant's property upon his death, the presumptions indulged with reference to the relations between parent and child cannot prevail as against plaintiff's contention that she was to be paid for her services. *Kirklin v. Clark*, 358, 366 (9).
2. *Implied Contracts.*—Where there was evidence tending to show that plaintiff was taken into defendant's family when she was a child nine years old, and that she lived there continuously until she was thirty-six, performing all sorts of labor about the house and in the fields at appellee's request, and that when plaintiff was eighteen years old both defendant and his wife promised to pay her well for her work if she would remain with them, it cannot be said that there is any presumption that plaintiff was to continue as a member of defendant's family, especially after she had reached the age of twenty-one, and the jury had a right to determine from such evidence that plaintiff was entitled to compensation for her services. *Kirklin v. Clark*, 358, 364 (7), 365 (7).

WRITTEN INSTRUMENTS—

Where a written contract appears to be complete, it is presumed to be the repository of the final intention and agreement of the parties, see EVIDENCE 7.

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